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IN THE
SUPREME COURT OF THE UNITED STATES
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OCTOBER TERM, 1994

MANUFACTURAS INTERNACIONALES LTDA; ABUCHAIBE HNOS LTDA; COMERCIAL SAMORA LTDA; CREACIONES VIVIANA LTDA; COMERCIAL ESTRELLA LTDA; CONFECCIONES Y TEJIDOS NACIONALES LTDA; MANUFACTURERA DEL ATLANTICO LTDA; and INDUSTRIAS MARATHON LTDA,

Petitioners,

V.

MANUFACTURERS HANOVER TRUST BANK COMPANY; BANCO ATLANTICO; and THE BANK OF NEW YORK,

Respondents.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE INTERMEDIARY BANKS MAY BE HELD LIABLE UNDER 18 U.S.C. § 2520, BECAUSE THEY KNOWINGLY PROGRAMMED THEIR COMMUNICATION MODEMS, A "DEVICE," FOR A PERIOD OF OVER 45 DAYS, TO CONTEMPORANEOUSLY ACQUIRE AND THEN DID DISCLOSE TO THE UNITED STATES THE CONTENTS OF PETITIONERS' IN TRANSIT ELECTRONIC FUND TRANSFER COMMUNICATIONS, BASED ONLY ON THE UNITED STATES' VERBAL ORDERS ISSUED IN NONCOMPLIANCE WITH 18 U.S.C. §. 2518(7), AND IN REM WARRANTS ISSUED IN NONCOMPLIANCE WITH 18 U.S.C. §. 2516(3)?

II. WHETHER THE INTERMEDIARY BANKS MAY BE HELD LIABLE UNDER 18 U.S.C. §. 2707, DUE TO THEIR DISCLOSING TO THE UNITED STATES THE CONTENTS OF PETITIONERS' IN TRANSIT ELECTRONIC FUND TRANSFER COMMUNICATIONS PLACED IN COMPUTER STORAGE IN VIOLATION OF 18 U.S.C. §. 2703(a)?

LIST OF PARTIES

In accordance Rule 12 of the Rules of the Supreme Court of the United States, this petition seeks review on a writ of certiorari to the United States Court of Appeals for the Second Circuit of a final decision in Manufacturas International Ltda. vs. Manufacturers Hanover Trust Co., and Consolidated Cases, 792 F. Supp. 180 (E.D.N.Y. 1992) (Weinstein, J.) Ct. App. No. 92-7360 (decided January 30, 1995).

The Petitioners that have appeared in this case include those listed on the case caption, and they neither have any parent companies nor any subsidiary companies.

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IN THE
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OCTOBER TERM, 1994

Manufacturas Internacionales Ltda; Abuchaibe Hnos Ltda; Comercial Samora Ltda; Creaciones Viviana Ltda; Comercial Estrella Ltda; Confecciones y Tejidos Nacionales Ltda; Manufacturera del Atlantico Ltda; and Industrias Marathon Ltda,

Petitioners,

v.

Manufacturers Hanover Trust Bank Company; Banco Atlantico; and The Bank of New York,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of New York, dated February 27, 1992, in

Manufacturas International Ltda. vs. Manufactures Hanover Trust Co., and Consolidated Cases, 792 F. Supp. 180 (E.D.N.Y. 1992) (Weinstein, J.) (hereinafter "Consolidated Bank Cases), is reproduced at App. 1a.[1]

The opinion of the United States Court of Appeals for the Second Circuit dated January 30, 1995, Ct. App. No. 92-7360, is not yet reported, and is reproduced at App. 1b.

The Petitioners were claimants in the in rem forfeiture action United States v. All Funds on Deposit in any Account Maintained at Merrill, Lynch, Pierce, Fenner & Smith, 801 F. Supp 984 (E.D.N.Y. 1992) (Weinstein, J.)(herein

[1] "App. " references are to the section and page number in the Appendix.

after "All Funds Case"), reproduced at App. 1c; and were appellants in the subsequent appeal, United States v. Daccarett, 6 F.3rd 37 (2nd Cir. 1993), cert. denied, 114 S.Ct. 1294 (1994) (hereinafter "Daccarett"), reproduced at App. 1d.

Finally, although the Petitioners were not parties in Organizacion JD Ltd a., and Manufacturas JD Ltda. v. United States of America, Drug Enforcement Administration, Banco Atlantico, and the Bank of New York, 18 F.3d 91 (2nd Cir.) cert. denied 1994 WL 195065, 62 USLW 3824 (1994)(hereinafter "Organizacion JD"), because the action is related and on remand, for the convenience of the Court the trial court's order is reproduced at App. 1e, and the court of appeals decision is reproduced at 1f.

A. STATEMENT OF JURISDICTION

The Second Circuit issued its opinion on January 30, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTE INVOLVED

THE ELECTRONIC COMMUNICATIONS PRIVACY ACT OF 1986

18 U.S.C. § 2511:

(1) Except as otherwise specifically provided in this chapter any person who-

(a) intentionally intercepts,. . . , any . . . electronic communication;

(c) intentionally discloses, . . . to any person the contents of any . . . electronic communication, knowing or having reason to know that the information was obtained through interception of . . . electronic communication in violation of this subsection . . . shall be subject to suit as provided in subsection (5).

(2)(a)(i) . . . a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(3)(a) Except as provided in paragraph (b) of this subsection, a person

or entity providing an electronic commu nication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

18 U.S.C. § 2520:

(a) **In general.**-Except as provided in section 2511(2)(a)(ii), any person whose . . . electronic communication is intercepted, disclosed, . . . in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief may be appropriate.

(b) **Relief.**-In a civil action under this section, appropriate relief includes-

(2) damages under subsection (c) and punitive damages in appropriate cases; and,

(3) a reasonable attorney's fee and other litigation costs reasonable incurred.

(d) **Defense.**-A good faith reliance on-

(1) a court warrant or order . . .

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title;. . . .

is a complete defense against any civil or criminal action brought under this chapter or any other law.

18 U.S.C. § 2702. **Disclosure of contents:** (a) **Prohibitions.-** Except as provided in subsection (b)-

(1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service;. . .

18 U.S.C. § 2707. (a) **Cause of action** Except as provided in section 2703(e), any . . . customer aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity which engaged in that violation such relief as may be appropriate.

(b) **Relief.**-In a civil action under this section, appropriate relief includes-

(2) damages under subsection (c); and,

(3) a reasonable attorney's fee and other litigation costs reasonable incurred.

(d) **Defense.**-A good faith reliance on-

(1) a court warrant or order . . .

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; . . . .
is a complete defense to any civil or criminal action brought under this chap ter or any other law

STATEMENT OF THE CASE

1. At the District Court

Manufacturers Hanover Trust Company, Banco Atlantico and the Bank of New York (hereinafter the "Intermediary Banks"), are subscribers to the three major world-wide electronic communication fund transfer services to the public (FEDWIRE, SWIFT, and CHIPS), and in this capacity as electronic communication service providers, the Intermediary Banks, handle daily billion of dollars of electronic fund transfers.

In their capacity as part of said electronic communication service, the Intermediary Banks received on July 17, 1990, verbal instructions from agents of

the United States government to program their respective communication modems to contemporaneously acquire and then disclose to the United States the contents of every third party electronic funds transfer communications in transit to - the Republic of Colombia.

Based only on these verbal orders, for over 45 days, the Intermediary Banks did knowingly acquire said in transit communication, placed the information in computer storage, and then disclosed the electronic fund transfer information to the United States.

As explained by the representative of Banco Atlantico,

> . . . <u>We got instructions to fax them over every transaction that we got for third-party beneficiaries in Colombia</u> . . . . What we would do is fax a copy of the transaction to Mr. Hui and then he would, same day or the next day the latest, tell us over the phone, "Okey, you

> are supposed to freeze this transaction as well." And then usually the same day or the day after we would get the [amended warrant for arrest of article-in-rem]. (emphasis added).

Based on the above verbal orders, Banco Atlantico disclosed to United States: a. two electronic fund transfer communications intended for Abuchaibe Hnos. Ltda., dated (i) July 17, 1990, for $200,000.00 and (ii) July 18, 1990, for $54,070.00; b. one electronic fund transfer communication intended for Comercial Samora dated July 18, 1990, for $124,000.00; c. one electronic communication intended for Creaciones Viviana Ltda., dated July 19, 1990, for $125,025.00.

Also based only these verbal orders, Manufacturers Hanover Trust Company acquired and disclosed the contents of the in transit electronic

communication intended for Industrias Marathon Ltda., dated July 20, 1990, for $805,194.35

Solely based upon the information disclosed to the United States during the pervious 72 hours by the Intermediary Banks, a Drug Enforcement Administration administrative subpoena was issued on July 20, 1990, which prohibited notice to the intended beneficiaries of the intercepted electronic communications, and sought all fund transfer information in electronic storage for the previous 180 days for said intended beneficiaries.

On July 23, 1990, again based only on these verbal telephone instructions of the United States, the contents of the in transit electronic communication intended for Manufacturas Internacional

Ltda. for $599,970.00; and intended for Manufacturera del Atlantico Ltda. for $492,810.00, were acquired and disclosed to the United States by Manufacturers Hanover Trust Co.

Later on July 24, 1990, Banco Atlantico acquired and disclosed to the United States the contents of the in transit electronic communication in the amount of $301,500.00, intended for Comercial Estrella.

On July 26, 1990, Manufacturers Hanover Trust Co., acquired and disclosed the contents of an in transit electronic communication in the amount of $549,990.00, intended for Confecciones y Tejidos Nacionales Ltda.

It was not until three weeks after first issuing these verbal instructions to acquire and disclose all third party

fund transfer communications going to the Republic of Colombia, did the United States use the information obtained between the period of July 17, 1990 through August 8, 1990, to issue the Sixth Amended In Rem Complaint and Warrant, and execute them on Manufacturers Hanover Trust Co., and on Banco Atlantico on July 31, 1990; and the Seventh Amended In Rem Complaint executed on the Bank of New York; Banco Atlantico; and Manufacturers Hanover Trust Co. on August 8, 1990.

Thus the fact establishes that the Intermediary Banks, based only on verbal orders, acquired and disclosed to the United Stated in transit electronic communication well beyond the 48 hours permissible time period under 18 U.S.C. §. 2518(7).

Based on the above acts of the Intermediary Banks, the Consolidated Bank Cases (App 1a), were filed as nine separate actions on July 18, 1991.

These individual actions were consolidated and transferred to Judge Weinstein, who was presiding over the All Funds Case (App 1c). On February 27, 1992, after denying any discovery, Judge Weinstein granted the Intermediary Banks' F.R.C.P 12(b)(6) motion in the Consolidated Bank Case. Judge Weinstein held that based on the "relation back doctrine," the electronic communications disclosed belonged to the United States, thus the Intermediary Banks compliance with the in rem warrant issued under 21 U.S.C. § 881, was sufficient to support a "good faith reliance" defense (App. 25a thru 31a).

A timely appeal to the United States Court of Appeals for the Second Circuit was filed in March, 1992.

2. At the Court of Appeals

While still in the midst of a jury trial in the All Funds Case, on April 24, 1992, a Stipulation was entered to suspend the Consolidated Bank Case appeal, pending a final decision in the All Funds Case.

At the conclusion of the jury trial in the All Funds Case, the Petitioners' motion to reinstate the Consolidated Bank Case was denied.

On August 5, 1992, in the All Funds Case Judge Weinstein issued his final decision wherein based on his "relation back doctrine" holding in the Consolidated Bank Case, he dismissed all claims

of violation of the Electronic Communication Privacy Act of 1986 (App 46c).

Also on August 5, 1992, Organizacion JD (App. 1e) was filed against the Intermediary Banks by the prevailing parties in the All Funds Case. The case was assigned to Judge Weinstein.

In September, 1992, a motion to reinstate and consolidate the Consolidated Bank Case appeal with the All Funds Case appeal was again denied.

On December 2, 1992, Judge Weinstein dismissed Organizacion JD based on this "relation back doctrine" holding in the Consolidated Bank Case.

Although refusing all attempts to reinstate and timely consider the Consolidated Bank Case during the preceding 19 months the Second Circuit on September 10, 1993, issued its final

decision in Daccarett (App. 1d), which affirmed Judge Weinstein's holdings in the All Funds Case, that the provisions of the Electronic Communication Privacy Act was not applicable, based on the "relation back doctrine" holding in the Consolidated Bank Case (App 58d thru 64d).

On February 24, 1994, in Organizac ion J.D. (App. 1f), the Second Circuit declared "that no civil liability existed under 18 U.S.C. § 2520, because the contemporaneous seizures of the electronic communication did not constitute "interception" since no "device" was used by the United States, and that "exigent circumstances" existed (App. 6f). However it vacated and remanded to for further consideration the allegation of liability against the United States

and the Drug Enforcement Administration under 18 U.S.C. § 2703.

But the Second Circuit used the Consolidated Bank Case holding to affirm that the Intermediary Banks were not civilly liable under 18 U.S.C § 2707 because of their alleged good faith reliance on the in rem court warrants issued under 21 U.S.C § 881(b)(4) (App. 12f).

On January 26, 1995, after nearly three years of keeping this timely appeal suspended, the Second Circuit finally permitted oral argument in the Consolidated Bank Case, and issued its order on January 30, 1995 (App 1b).

In their order in the Consolidated Bank Cases, the Second Circuit, relied on its holding in Daccarett and Organizacion JD as "law of the case," so to

totally disregard the alleged violations of 18 U.S.C. § 2518(7), and § 2703(a).

REASONS FOR GRANTING THE WRIT

Because the holdings of the Second Circuit in the All Funds Case, Daccaretta, and the Consolidated Bank Case, are in conflict with the decision of the Fifth Circuit in Steve Jackson Games Inc. v. United States Service, 36 F.3rd 457 (October 31, 1994); 1994 U.S. App. Lexis 30322, and involve an important question of federal statutory interpretation of the term "device," the petition for writ of certiorari should be granted.

A. THE SECOND CIRCUIT ERRED BECAUSE IT DID NOT CONSIDER THE PROHIBITION AGAINST THE INTERMEDIARY BANKS CONTEMPORANEOUSLY ACQUIRING AND DISCLOSING ELECTRONIC COMMUNICATIONS TO THE UNITED STATES.

Only by disregarding the prohibition in 18 U.S.C. § 2511(2)(a)(i) and

(3)(a), were the Intermediary Banks able to acquire and disclose to the United States the contents of all third party electronic communications going to the Republic of Colombia during the 45 day period of July 17 through August 26, 1990.

The legislative history of 18 U.S.C. § 2511, states:

> The exception to the divulgence bar are relatively straightforward. . . . **If the provider purposefully sets out to monitor . . . , this exception would not apply.** (Emphasis added) Judiciary Committee, Senate Report No. 99-541, 99th Congress, 2nd Sess. (1986), at page. 3580.

In this action the Intermediary Banks did exactly what Congress specifically prohibited.

Based only on the verbal orders of the United States, the Intermediary Banks set out to monitor for over a 45

day period all third party electronic fund transfer communications going to the Republic of Colombia by programming "stop ques" in their respective electronic funds transfer communications computer modems.

A modem, is short for modulator/demodulator, which is the only type of electrical device used to permit communications between computers at different sites, or between a computer and remote terminal. It does so by converting binary digital computer data into analog signals which can pass over telephone lines. Rixon, Inc. v. Racal-Milgo, Inc., D.C. Del, 551 F.Supp. 163, at 165; See Vol 27, Words and Phrases, Permanent Edition, West Pub. 1989 Supp.

Without the Intermediary Banks modem, no information could be acquired

and disclosed. See footnote 6, Steve Jackson Games Inc. v. United States Service, 36 F.3rd 457 (October 31, 1994); 1994 U.S. App. Lexis 30322

Consequently, the Second Circuit holding that the United States did not use a "device" to acquire the contents of the Petitioners electronic communication does not address the issue of whether or not the Intermediary Banks used their modem as a device to contemporaneously acquire and disclose the in transit funds transfer communications.

The facts are admitted that but for the United States verbal instructions, procuring the Intermediary Banks to program the "stop cues" in their respective modems, and thereby monitor all third party electronic funds transfer

communications in transit going to the Republic of Colombia, the Petitioners' electronic funds transfer communications would have passed uninterrupted through the electronic communication service providers system to the Beneficiary Bank in the Republic of Colombia, and finally to the Beneficiary.

The Second Circuit went on to use the holding of the trial court in the Consolidated Bank Case, while it held the appeal in "suspension," to decide in Daccarett, that the provisions of 18 U.S.C. § 2510 et seq. did not apply "[b]ecause the government did not use any type of `device' to obtain the EFTs and information, no `interception' occurred" (App. 64d).

Thus the Second Circuit held that the verbal order of United States issued

pursuant to 21 U.S.C. § 881(b)(4), authorized the contemporaneous acquiring of the contents of in transit electronic communications without a warrant. Finally, the Second Circuit failed to consider at all the alleged violations of 18 U.S.C. § 2703(a).

The holdings of the Second Circuit, are in clear conflict with the recent holding of the Fifth Circuit in Steve Jackson Games Inc. v. United States Service, 36 F.3rd 457 (October 31, 1994); 1994 U.S. App. Lexis 30322, because the Second Circuit failed to provide the protection to electronic communications which Congress mandated by not addressing the admitted fact that the Intermediary Banks were involved in the contemporaneous acquisition of the electronic communications through the

use of their modems. See United States v. Turk, 526 F.2d 654 (5th Cir.), cert. denied, 429 U.S. 823, 97 S.Ct. 74, 50 :.Ed. 84 (1976).

Specifically the Second Circuit never considered the amendments Congress enacted to 18 U.S.C. § 2511(1)(a) and (c), which specifically bar the United States from procuring any other person or entity, including the Intermediary Banks, from acquiring and disclosing the contents of electronic communication without judicial authorization obtained under 18 U.S.C.§ 2518, not just the self executing warrant issued under the Supplemental Rules of the Federal Rules of Civil Procedure.

Also the Second Circuit never considered 18 U.S.C. § 2511(2)(a)(i), prohibition against the Intermediary Banks

programming "stop ques" in their observ ing or random monitoring devices, to obtain access to electronic communications in transmission.

The Second Circuit never considered 18 U.S.C. § 2511(3)(a), prohibition against the Intermediary Banks intentional disclosing the contents of an electronic communication while in transmission on the service, except to the addressee or intended recipient upon proper judicial authorization under 18 U.S.C. § 2518.

Furthermore, under 18 U.S.C. § 2518(7), the Intermediary Banks were only permitted to provide the United States access to in transit electronic communication when an alleged emergency situation or "exigent circumstances" existed, if, and only if, within 48

hours of acquiring the contents of the electronic communication, an application was made by the United States and approved under the Federal Rules of Crimi nal Procedures.

Thus when an alleged emergency situation or "exigent circumstances" exists that involve the procuring of access to content of information in electronic communication, it is the newly enacted standard under 18 U.S.C. § 2518(7), which must be complied with, not the general lesser standard under the Fourth or Fifth Amendments. See §19.5, at p. 373, The Law of Electronic Commerce, Benjamin Wright, Little, Brown and Co. (1991).

Based on the above omissions it is respectfully argued that the previous

decisions of the Second Circuit are not controlling precedents since they totally failed to address the requirement of 18 U.S.C. §§ 2511(1)(a) and (c) and (3)(a), 2518(7) and 2703(a).

B. BECAUSE THE "RELATION BACK DOCTRINE" WAS USED TO DENY DISCOVERY, THIS ACTION SHOULD BE REMANDED TO PERMIT MEANINGFUL INQUIRY INTO THE INTERMEDIARY BANKS DEFENSE OF "GOOD FAITH RELIANCE."

As explained by the Fifth Circuit in Steve Jackson Games Inc. v. United States Service, 36 F.3rd 457 (5th Cir., October 31, 1994); 1994 U.S. App. Lexis 30322, Congress in enacting Electronic Communication Privacy Act of 1986, 18 U.S.C. §§ 2520 and 2707, authorized the maintaining of a civil action for damages by any person who was the intended recipient of an electronic communication in transit or in electronic storage, for which the contents were acquired and

disclosed without proper authorization. See Judiciary Committee, S. Rep. No. 99-541, 99th Congress, 2nd Sess. (1986); H.R. Rep. Mo. 99-647, 99th Congress, 2d Sess. (1986).

Under both 18 U.S.C. §§ 2520(d) and 2707(d), a showing of "good faith" reliance on an authorized court warrant or order issued under 18 U.S.C. §§ 2518 and 2703(a) and (e), is a complete defense to a civil action for damages.

However, under 18 U.S.C. § 2516(3), to be a valid court order, even an in rem warrant requested under the authority contained in 21 U.S.C. § 881(b)(4), must be issued in accordance with the requirements of Congress mandated in 18 U.S.C. § 2518(7), either before the acquiring of the electronic communication or within 48 hrs thereafter.

More importantly under 18 U.S.C. § 2703(a), the only authorized court warrant or order which would permit and make not actionable the Intermediary Banks acquiring access to and disclosing of electronic communications which were in transit and in electronic storage for less than 180 days, is one issued in accordance with the provisions of the Federal Rules of Criminal Procedure.

However, since Judge Weinstein denied all discovery and granted summary judgement based on the "relation back doctrine," the trial court never considered whether the Intermediary Banks in fact complied with the specific "good faith reliance" provisions of the Electronic Communication Privacy Act of 1986.

Although this use of the "relation back doctrine" by Judge Weinstein was subsequently overruled by the Second Circuit in Daccarett, based on the decision of the Supreme Court in United States vs. A Parcel of Land, Building, Appurtenances and Improvements, Known as 92 Buena Vista Avenue, Rumson, New Jersey, Et. Al., 113 S.Ct. 1126 (1993), the Second Circuit still affirmed the lower court's holding.

Thus the Intermediary Banks never were required to demonstrate that in fact they relied in "good faith" on a facially valid court order required under 18 U.S.C. §§ 2518(7) and 2703(a), prior to acquiring access to and disclosing the Petitioners' electronic communications.

Although this is a factual questions, all discovery was denied by the trial court based on the "relation back doctrine." Thus in accordance with the Petitioners' right under 18 U.S.C. §§ 2520(d)(1) and 2707(d)(1), this action must be remanded to permit discovery and the requested jury trial on the fact that each of the electronic communications acquired and disclosed by the Intermediary Bank was based on the verbal order of United States under 21 U.S.C. § 881(b)(4), and subsequently executed in rem subpoenas.

C. THE INTENDED BENEFICIARIES OF THE ELECTRONIC COMMUNICATIONS ARE THE CLASS CONGRESS SOUGHT TO PROTECT FROM UNAUTHORIZED DISCLOSURE.

The Petitioners were the intended recipients of all the electronic communications which the Intermediary

Banks acquired access to, and disclosed to the United States.

The Intermediary Banks, as part of the FEDWIRE communication service, agreed to comply with the instructions contained in the electronic communication transmitted on said service. Thus the Intermediary Banks were neither the intended recipient nor a party to the acquired electronic communications, but were part of the electronic communication service provider system. See 18 U.S.C. § 2511(3)(a).

Under 18 U.S.C. §. 2510(12), an "aggrieved person" is defined as "a person who was a party to any intercepted wire. . . electronic communication or a person against whom the intercept was directed;...." (emphasis added).

Furthermore, 18 U.S.C. § 2707(a), permits recovery on the part of a "customer" of the service.

This statutory construction, which permits the intended recipient of an electronic communication to be the party in interest, is consistent with court decisions which have found that the receiving banks cannot deviate from the instruction contained in electronic communications.

In Evra Corp v. Swiss Bank Corp. 673 F.2d 951 (7th Cir. 1982), although the Court of Appeals held that under the holding of Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. (1854), a suit for consequential damages against a bank which fails to make a requested transfer of funds would not be maintained, the

Court held in dicta that a bank would be liable for direct damages Id. p. 955.

Furthermore, in Southern Electric Supply Co. v. Raleigh County National Bank, 320 S.E.2d 515 (W.Va. 1984), the court held that the beneficiary of a wire transfer would have a cause of action against a beneficiary bank for deviation from the instructions without the beneficiaries' consent or proper authority. The Court stated,

> [w]e would be hardpressed to think of a situation in which we could condone a bank's decision to ignore the instructions of a [sender] and unilaterally decide to alter [an electronic fund transfer]. To get a third party's funds, a bank would need explicit authority from the third party.... Whether the unauthorized person is a stranger, family, or bank officer, the withdrawal is wrongful. When a wire transfer comes to a bank, it is obligated by the transmission to credit the designated account. Id. 320 S.E.2d at 519.

The intended recipient's right of action is also recognized in Regulation J of the Federal Reserve System, 12 C.F.R. §210, (January 1, 1990 Edition), issued by the Board of Governors of the Federal Reserve System, because the regulation places a duty on the Intermediary Bank to follow the instructions contained in the wire transfer. 12 C.F.R. §210.26 Definitions, states:

> "Transferee" means a member bank, or other institution that (1) main tains or, if authorized by the Reserve Bank, uses an account at a Reserve Bank and (2) is designated in a transfer item or request to receive the amount of the item or request.

12 C.F.R. §210.30(b) Transferee's agreement, states:

> A transferee...that receives a transfer item, or advice of credit of a transfer item, designating a beneficiary agrees:
> (1) To credit promptly the beneficiary's account or otherwise make

> the amount available to the beneficiary: or
> (2) To notify promptly its reserve Bank if it is unable to do so because of circumstances beyond its control. (Emphasis added)

The above court decisions and regulations which provide a right of action by the intended beneficiary of an electronic communication was unified by the Commissioners on Uniform State Laws and the American Law Institute in U.C.C. Article 4A.

U.C.C. 4A, is aimed at providing a comprehensive body of law governing electronic fund transfer communications. See D. Baker & R. Brandel, The Law of Electronic Fund Transfer Systems, ¶1.0-1(2d ed. 1988), and to this end on January 12, 1991, the State of New York enacted the State of New York Uniform Commercial Code-U.C.C. §4-A.

Although the U.C.C. 4A was enacted in New York State six months after the Intermediary Banks action, it is useful for purposes of analysis of the intended beneficiaries rights.

Under U.C.C. § 4A-302, the receiving bank, whether it be the "intermediary bank" or the "beneficiary bank" is obligated to both the sender and the intended beneficiary to follow all instructions of the sender. Also under U.C.C. §4A-405, with the completion of each payment order, a bank becomes obligated to pay funds to the next link in the chain, culminating with the duty of the beneficiary's bank to pay the beneficiary.

Thus when the electronic funds transfers were received by the Intermediary Banks they were obligated to not

deviate from the instructions, and to immediately transmit the electronic funds transfers communication to the Petitioners, as the intended recipient and customer of the electronic communication service. The Intermediary Banks failure to comply with the instructions, permits a cause of action under both 18 U.S.C. § 2510 et seq.

CONCLUSION

In summary, the contents of every third party electronic communication going to the Republic of Colombia was disclosed to the United States based only on verbal orders or self executing in rem warrants issued under the Supplemental Rules of the Federal Rules of Civil Procedure.

The Intermediary Banks programmed a device, their modems, to acquire these electronic fund transfer communications for a period of over a 45 days based on verbal orders from the United States. Thus the Petitioners have a cause of action against the Intermediary Banks under 18 U.S.C. §§ 2516(3), 2518(7) and 2703(a), within 48 hrs. of the contemporaneous acquisition and disclosing of

Petitioners' in transit electronic fund transfer.

Respectfully submitted,

Manufacturas Internacionales Ltda; Abuchaibe Hnos Ltda; Comercial Samora Ltda; Creaciones Viviana Ltda; Comercial Estrella Ltda; Confecciones y Tejidos Nacionales Ltda; Manufacturera del Atlantico Ltda; and Industrias Marathon Ltda,

By: Isidoro Rodriguez
Isidoro Rodriguez, Esq.

Attorney for Petitioners
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No. _____

FILED

APR 24 1995

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

MANUFACTURAS INTERNACIONALES LTDA; ABUCHAIBE HNOS LTDA; COMERCIAL SAMORA LTDA; CREACIONES VIVIANA LTDA; COMERCIAL ESTRELLA LTDA; CONFECCIONES Y TEJIDOS NACIONALES LTDA; MANUFACTURERA DEL ATLANTICO LTDA; and INDUSTRIAS MARATHON LTDA,

Petitioners,

V.

MANUFACTURERS HANOVER TRUST BANK COMPANY; BANCO ATLANTICO; and THE BANK OF NEW YORK,

Respondents.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX-A

Reported at: 792 F. Supp. 180
(E.D.N.Y., 1992)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MANUFACTURAS INTERNACIONAL LTDA,
Plaintiff,

- against -

MANUFACTURERS HANOVER TRUST CO.,
Defendant.

MEMORANDUM AND ORDER
cv-91-4536
(JBW)

CONSOLIDATED BANK CASES

ABUCHAIBE HNOS. LTDA,
Plaintiff,

- against -

BANCO ATLANTICO S.A.,
Defendant.

COMERCIAL SAMORA,
Plaintiff,

- against -

BANCO ATLANTICO S.A.,
Defendant.

CREACIONES VIVIANA,
Plaintiff,

- against -

BANCO ATLANTICO S.A.,
Defendant.

NELSON GOMEZ-COSTAFAST, and
NELSON GOMEZ- FASTER,
Plaintiffs,

- against -

BANK OF NEW YORK,
Defendant.

CREACIONES VIVIANA, LTDA,
Plaintiff,

- against -

BANCO ATLANTICO S.A.,
Defendant.

COMERCIAL ESTRELLA LTDA,
Plaintiff,

- against -

BANK OF NEW YORK,
Defendant.

CONFECCIONES Y TEJIDOS
NACIONALES LTDA,
Plaintiff,

- against -

MANUFACTURERS HANOVER TRUST CO.,
Defendant.

MANUFACTURERA DEL ATLANTICO LTDA,

Plaintiff,

- against -

MANUFACTURERS HANOVER TRUST CO.,

Defendant.

INDUSTRIAS MARATHON LTDA,

Plaintiff,

- against -

MANUFACTURERS HANOVER TRUST CO.,

Defendant.

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WEINSTEIN, J.:

In ancient times, the dagger used to stab a person to death was forfeited to the Crown -- a practice having both legal and religious significance. 2 Sir Frederick Pollock & Frederic W. Maitland, The History of English Law 473-74 (2d Ed. 1968); Exodus 21 21:29. Recently this concept of the deodand has been extended to permit the government to seize the profits of narcotics traffickers. See 21 U.S.C. § 881 et seq. (1988 & Supp. III 1991), and 18 U.S.C. § 981 et seq. (1988 & Supp. III 1991). Expanding an archaic concept from a simpler society to fit our complex technology creates the interesting legal tensions reflected in these proceedings. Yet, the essential ancient and modern theory that forfeiture occurs simultaneously with the tainting of the object by the crime applies and requires dismissal of these Bank Cases.

See 18 U.S.C. § 981(b); 21 U.S.C. § 881(h).

Modern forfeiture cases continue to reflect the legal fiction that is the property which has committed a wrong. United States v. One Mercedes-Benz 380 SEL VIN # WDBCA 33A1BB10331, 604 F. Supp. 1307, 1312 (S.D.N.Y. 1984) ("the vehicle itself is guilty of facilitating crime"), aff'd, 762 F.2d 991 (2d Cir. 1985). As in the distant past, the accused instrument is instantaneously the property of the government when it becomes tainted with the heinous crime -- here, drug trafficking. 21 U.S.C. § 811(h) (1988 & Supp. III 1991) ("All right, title, and interest in property [seized . . . shall vest in the United States upon commission of the act giving rise to forfeiture under this section."); see cases cited infra Part III. The

government, as putative owner of allegedly guilty funds, is entitled to take appropriate steps to locate the property and take it into custody. Cf. 21 U.S.C. § 881(c) (1988 & Supp. III 1991) ("Property taken or detained . . . shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof.").

As part of a suspected drug money-laundering operation, large amounts of funds were being electronically transferred from Europe to South America via New York banks. The banks cooperated with government requests, subpoenas, and court orders by stopping transmission and turning the funds over to the court. The claimants to the funds -- primarily Colombian business concerns -- sue the banks in these Bank Cases for loss of the

use of their funds and other claimed violations.

The banks move to dismiss. Their argument is elementary and correct: those who assist the government are not liable to those who claim ownership of what the government contends is already forfeited by the taint of drug trafficking. Faced with competing claims to the same funds, the banks followed instructions and took the sensible step of paying the moneys into court in a form of interpleader. Even if after adjudication it is determined that the funds are not tainted, no fault can be attributed to the banks.

I. FACTS

The electronic funds transfers at issue were seized based on complaints in United States v. All Funds on Deposit at

Merrill Lynch, Pierce Fenner & Smith, Inc., CV 90-2510 (All Funds). These funds are alleged by the government to be the proceeds of illegal narcotics transactions forfeited under 21 U.S.C. § 881 et seq. (1988 & Supp. III 1991), and 18 U.S.C. § 981 et seq. (1988 & Supp. III 1991). The instant parallel private actions against Manufacturers Hanover Trust, Banco Atlantico, and the Bank of New York are consolidated as the Bank Cases.

The first government document to mention these plaintiffs was the Third Amended All Funds Complaint filed July 18, 1990, with its accompanying Supplemental Warrant for Arrest of Articles in Rem issued pursuant to Rule C(3) of the Supplementary Rules for Certain Admiralty and Maritime Claims. An individual named Jose Santacruz-

Londono and others working with him had allegedly "conducted extensive narcotics trafficking and money laundering enterprises, involving millions of dollars and multi-kilograms of cocaine smuggled into the United States and distributed, in part, in the New York metropolitan area."

Santacruz-Londono is said to hold a high position in the Cali drug cartel of Colombia. In 1985, he was indicted in the Eastern District of New York for conspiring to distribute cocaine, distributing cocaine, and operating a continuing criminal enterprise. He is a fugitive.

The complaint alleged that in connection with Santacruz-Londono's narcotics trade, substantial sums of money have been deposited in, withdrawn from, and transferred to and from

accounts located in the United States, including the defendant accounts, and other accounts located in Europe, Panama, and Colombia.

During the month of June 1990, three individuals believed to be connected with the Santacruz-Londono organization had been observed meeting and depositing large sums in accounts at the following places and times:

June 11	Bologna, Italy
June 12 - 18	Portofino, Italy; Luxembourg City; Brussels; Copenhagen
June 19	Stockholm
June 20	East Berlin and West Berlin
June 21	Amsterdam

On June 29, 1990, two of the alleged Londono compatriots were arrested on money-laundering charges. A flurry of wire transfer activity followed these arrests.

On July 12, 1990, the Eastern

District of New York issued an International Letter Rogatory to the Federal Republic of Germany on information that Santacruz-Londono and others had imported and distributed cocaine in the United States and conspired to disguise the sources and ownership of the proceeds. The government claimed that the Santacruz-Londono organization was importing approximately 3,000 kilograms of cocaine a month into the United States.

A district judge of this court signed the Letter Rogatory and subsequent arrest warrants. The banks which are defendants in these Bank Cases were instructed in the Supplemental Warrants for Arrest of Articles in Rem accompanying the Third through Seventh Amended Complaints filed July 18 through August 3, 1990 to attach all funds on

deposit in the name of various named individuals and entities and "all related entities and individuals." The United States Attorney also requested by telephone that the banks inform him of all electronic funds transfers received for third-party beneficiaries, only some of whom were named.

From the third week of July through the month of August 1990, the banks faxed copies of each transactions to the United States Attorney, who then instructed the banks whether the beneficiaries were "related entities or individuals" and whether the transfers should be attached. The same or the next day the bank would get official notification to seize. Each of the successive Amended Complaints in All Funds named more beneficiaries as their identities became know.

There are now twenty-three claimants

in All Funds, ten of whom are plaintiffs in these Bank Cases. None of the plaintiffs in the Bank Cases maintained accounts at the defendant banks. Rather, the plaintiffs were customers of Colombian banks that maintained correspondent banking relationships with the defendant banks. The defendant banks were intermediary banks between the European originating banks and the Colombian receiving banks.

To effect the wire transfers, the defendant banks were supposed to credit the Colombian banks' correspondent accounts. In turn, the Colombian banks were to advise the beneficiaries of the credits. Instead, the defendant banks complied with the requests of the United States Attorney and the instructions of the court and seized the funds on deposit and the wire transfers.

On July 24, 1990, a show cause order presented by the government why the funds should not be paid into court was not opposed by the claimants. The court on July 30, 1990 ordered the banks to pay all attached funds into court. The order also instructed that funds submitted to the court should be accompanied by identifying information such as the beneficiary and the ordering party. During August 1990, the banks complied, and seized funds were transmitted to the Clerk of the Court of this district. The funds are being maintained in an interest-bearing account pending the outcome of the All Funds trial set to begin on March 9, 1992.

On March 26, 1991, the All Funds claimants moved for summary judgment and to dismiss the government's complaint on the ground that the government lacked

probable cause to seize the funds, that wire transfers are not a res, and that the funds were seized without a warrant. On April 12, 1991, this court denied the motions to dismiss and for summary judgment. The case was remanded to a Magistrate Judge for a decision on whether there was probable cause to seize the funds as proceeds of narcotics trafficking and money-laundering. A supplemental hearing before the court was to be scheduled in the event that the Magistrate Judge found probable cause.

After a hearing, the Magistrate Judge found that the government had probable cause to seize the funds. On May 28 and 29 and June 6, 1991, a district judge also held a hearing on the probable cause issue. On June 13, 1991 this court issued an order finding that, based on the documentary evidence and the

testimony of witnesses and experts, probable cause existed to believe that all the funds seized by the government and the subject of the verified claims are subject to forfeiture, except one Merrill Lynch account in the name of Jaime and Cecilia Vargas in the amount of $8,542.35. That small amount was released. The subject funds of the June 13 order were those on deposit in certain identified accounts and the wire transfers at issue in these Bank Cases.

The Bank Cases were then pending in the district court for the Southern District of New York. On October 30, 1991, that court transferred the consolidated Bank Cases to the Eastern District of New York on the grounds that the cases were legally and factually related to United States v. All Funds. See 28 U.S.C. § 1404(a) (1988). In the

Bank Cases, plaintiffs argue that the banks violated several federal statutes by seizing the funds: the Right to Financial Privacy Act, 12 U.S.C. § 3401 et seq., the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510 et seq. (as amended by the Electronic Communications Privacy Act of 1986), the Federal Reserve Act, 12 U.S.C. § 464 et seq., and the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 et seq. In addition, plaintiffs have several state law claims based on the right to privacy, article 4-A of the Uniform Commercial Code, conversion, breach of a third-party contract, and gross and ordinary negligence. None of these federal or state claims has merit.

II. FORFEITURE PROCEEDINGS

Under the forfeiture statutes, 21 U.S.C. § 881 et seq. (1988 & Supp. III 1991), and 18 U.S.C. § 981 et seq. (1988 & Supp. III 1991), the government may seize any funds and objects of value furnished or intended to be furnished in exchange for a controlled substance. In addition, the government may seek forfeiture of all objects or funds traceable to or intended to facilitate such exchanges. Congress intended that forfeiture be "a powerful weapon in the war on drugs." United States v. 141st Street Corp., 911 F.2d 870, 878 (2d Cir. 1990), cert. denied, 111 S. Ct. 1017 (1991).

No procedural rules specifically apply to forfeiture actions. Instead, the government applies rules borrowed from the customs laws and from admiralty

and maritime law. One court has suggested that the application of these rules to forfeiture actions has created "a procedural morass--a morass in which the parties . . . bec[o]me hopelessly entangled." United States v. $38,000 in United States Currency, 816 F.2d 1538, 1540 (11th Cir. 1987). See generally George C. Pratt & William B. Petersen, Civil Forfeiture in the Second Circuit, 65 St. John's L. Rev. 653 (1991). This is somewhat of an exaggeration. Judicious use of available procedures and substantive law has permitted the courts to protect the rights of all concerned.

The present case combines the civil forfeiture laws with another area of law which has evolved with little regulation: the law of electronic funds transfers. Although electronic funds transfers account for the movement of hundreds of

trillions of dollars, few regulations govern the field. See generally Rainer Stockmann, Liability of Intermediary and Beneficiary banks in Funds Transfer: A Comparative Study of American and German Law, 8 Int'l Tax & Bus. Law. 215, 217 (1991); Jeffrey S. Tallackson & Norma Vallejo, International Commercial Wire Transfers: The Lack of Standards, 11 N.C.J. Int'l L. & Com. Reg. 639, 639 n.1 (1986). As two commentators have noted:

> Despite [the] ubiquity [of such transactions] in domestic and in domestic and international banking as well as the susceptibility of such systems to error and fraud, wire transfer systems have evolved virtually immune from any legislative regulation of the parties' right and duties. No coherent body of law governs this area.

Id. at 639-40.

To understand the facts of this case, some background in the mechanics of wire transfers is necessary. The

following brief description of one kind of funds transfer system is borrowed from Delbrueck & Co. v. Manufacturers Hanover Trust Co., 609 F.2d 1047, 1049 n.1 (2d Cir. 1979) (description reprinted from district court opinion, 464 F. Supp. 989, 992 n.5 (S.D.N.Y. 1979)).

III. MECHANICS OF ELECTRONIC FUNDS TRANSFER

An electronic funds transfer begins with the sending bank. It normally receives a telex from the bank, individual, or corporate entity that is originating the transaction, instructing the sending bank to send funds. The sending bank tests and verifies the telex before transmitting the request, with all the identifying information, from its local computer operator to a central computer network. The central computer for the transfer system stores the

information and causes a sending message to be automatically printed at the sending bank.

The sending bank, having determined that payment is appropriate, returns the sending message to its local computer operator to reinsert the message into the computer and press a release key. When the central computer receives this message, it causes the simultaneous printing of a debit ticket at the sending bank and a credit ticket at the receiving bank. The central computer creates a permanent record of the transaction and adjusts the accounts of the sending and receiving banks. These steps are almost instantaneous.

Once the receiving bank has received the credit ticket, the individual or corporate beneficiary of the transfer is notified and the funds are made available

to the recipient -- generally the same day. The funds transfer is considered completed at the moment the receiving bank receives the credit message, not when the beneficiary acquires the funds. See generally Richard M. Gottlieb, Payment, Settlement, and Finality, in UCC Article 4-A. A Practical Guide for Bankers and Bank Counsel (Am. Bankers Ass'n 1991) [hereinafter Bankers Guide].

The receiving bank may be acting as an intermediary bank for a third bank, such as an overseas correspondent bank. If so, another transaction is necessary between the intermediary bank and the correspondent bank. Once the intermediary bank receives the funds, it should credit the account of the correspondent bank. In the instant case the sending banks are in Europe, the intermediary banks are in New York, and

the correspondent banks are in Colombia. The funds transfers were seized at the intermediary banks before the funds were credited to the Colombian correspondent banks.

As already indicated, acting on its own investigation, the United States Attorney notified the defendant intermediary banks by telephone that certain electronic funds transfers would be credited to those banks from sending banks. The intermediary banks examined all incoming wire transfers for their correspondent banks in Colombia, notifying the United States Attorney of all transfers designated for the identified beneficiaries. In addition, the banks notified the United States Attorney of other wire transfers to third-party beneficiaries, awaiting notification whether those funds were

intended for "related individuals and entities" and should also be seized. Upon instruction from the United States Attorney, the intermediary banks seized the funds and turned them over to the Clerk of the Court for this district.

In the context of a forfeiture proceeding, the plaintiffs have no cause of action against the banks. The property is considered forfeited at the moment the illegal act is committed. 18 U.S.C. § 981(b) (1988 & Supp. III 1991); 21 U.S.C. § 881(h) (1988 & Supp. III 1991). "[T]itle vests absolutely in the sovereign at the date of the illegal act." United States v. 1314 Whiterock & Improvements, San Antonio, Bexar County, Texas, 571 F. Supp. 723, 725 (W.D. Tex. 1983); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, ___, 109 S. Ct. 2646, 2653 (1989) (vesting at time of

illegal act under "taint theory)); United States v. Trotter, 912 F.2d 964, 966 & n.2 (8th Cir. 1990) (since government's title in forfeited property relates back to commission of crime, district court could not require fine assessed against defendant to be paid from seized funds); United States v. Walker, 900 F.2d 1201, 1204-05 (8th Cir. 1990) (forfeiture occurs at time of illegal act even though property may not be seized until later); In re Metmor Fin., Inc., 819 F.2d 446, 449-50 (4th Cir. 1987) (since at moment of criminal act original owner no longer owns the property, it is only innocent lienholder who may accrue interest); United States v. P.O. Box 1303, R.R. No. 2, Pekin Ill., 734 F. Supp. 841, 842 (C.D. Ill. 1990) (upon commission of crime United States succeeded to interest which non-innocent owners held as

contract buyers, where innocent owners held fee simple subject to a contract for purchase); United States v. 2511 E. Fairmont Ave., Baltimore, Md., 722 F. Supp. 1273, 1279 (D. Md. 1989) (since under "relation-back doctrine" of section 881(h) title had vested in the government at time of illegal act, parents could not succeed as heirs or donees of property from their son); United States v. One Piece of Real Property Located on Trafalgar Street in City of Aiken, S.C., 700 F. Supp. 857, 860-61 (D.S.C. 1988) (date on government's title relates back to date of crime), aff'd, 895 F.2d 987 (4th Cir. 1990); United States v. Real Property Titled in the Name of Shashin, Ltd, 680 F. Supp 332, 335-37 (D. Haw. 1987) (describing various court's treatment of post-seizure interest); United States v. Rod & Reel Fish Camp,

660 F. Supp. 483, 487 (S.D. Miss.) (since forfeiture occurs as of time of criminal act, third parties cannot acquire legal interest in property after that date), dismissed, 822 F.2d 57 (5th Cir.), remanded, 831 F.2d 566 (5th Cir. 1987); United States v. One Condominium Apartment, 636 F. Supp. 457, 458 (S.D. Fla. 1986) (since title vests in the United States at time of crime, innocent claimants only entitled to their principal and accrued interest up to time of seizure).

More precisely, the forfeiture, which relates back to the time of commission of the illegal act, is then " 'consummated' by a judgment or decree of a court." Western Pac. Fisheries v. SS President Grant, 730 F.2d 1280, 1287 (9th Cir. 1984) (dicta); see United States v. 1314 Whiterock & Improvements, San

Antonio, Bexar County, Texas, 571 F. Supp. 723, 725 (W.D. Tex 1983) ("Seizure and subsequent judicial decree of forfeiture merely confirm the forfeiture that has already taken place."); United States v. South 23.19 Acres of Land, 694 F. Supp. 1252, 1254 (E.D. La. 1988) (purpose of forfeiture proceeding is "only to perfect th[e] title" as between the government, which succeeded to a o n e - half interest when husband committed crime, and the wife, who was innocent and owned other half in community property state). But see United States v. Property Titled in the Name of Alexander Morio Toki & Elizabeth Mila Toki, ___ F. Supp.___, 1991 WL 255359 (Oct. 11, 1991) (where property held in tenancy by the entirety, at moment of crime innocent wife should succeed to entire property

and thus the government succeeds to nothing but is in a position analogous to that of an unsecured judgment creditor of the non-innocent owner spouse). The bank is in this case, acting at the direction of the government, seized money which the government considered its own because of the taint of narcotics trafficking.

IV. FEDERAL STATUTORY CLAIMS

A. RIGHT TO FINANCIAL PRIVACY ACT

The Right to Financial Privacy Act, 12 U.S.C. § 3401 et seq. (1988) [RFPA], is designed to protect the confidentiality of financial records from government intrusion. Section 3403(a) provides:

> No financial institution, or officer, employees, or agent of a financial institution, may provide to any Government authority access to or copies of, or the information

> contained in, the financial records of any customer except in accordance with the provisions of this chapter.

12 U.S.C. § 3403(a) (1988 & Supp. III 1991). Only where the customer has given authorization or where the financial institution takes action pursuant to an administrative or judicial subpoena, a search warrant, or certain other enumerated categories of formal requests may the government authorities obtain access to or acquire copies of the records. Id. §§ 3402, 3413, 3414.

The RFPA functions as an "express limitation on the authority of government agencies to acquire records of an individual's financial transactions." Clayton Brokerage Co. v. Clement, 87 F.R.D. 569, 570 (D. Md. 1980). The Act was designed to balance two competing interests: "[the] customers' right of privacy and the need of law enforcement

agencies to obtain financial records pursuant to legitimate investigations." Id. at 570-71 (citing 1978 U.S. Code Cong. & Adm. News 9273, 9305).

The Right to Financial Privacy Act does not apply here because the complainants are not "customers" within the meaning of the statute. Section 3401 defines a customer as

> any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name . . . .

12 U.S.C. § 3401(5) (1988 & Supp. III 1991). The plaintiffs, as beneficiaries of wire transfers, were arguably "utilizing a [] service of a financial institution." They did not, however, maintain accounts in their own names at the defendant banks.

Plaintiffs' position is that the RFPA requires that a person have an "account maintained in [his] own name" only when the bank is acting as his fiduciary, but not when the person is utilizing a service of the financial institution. This argument is not persuasive. The commas surrounding the phrase beginning with "or" and ending with "fiduciary" reasonably suggest that a customer must have an account in his own name in both situations. See Ridgeley v. Merchants State Bank, 699 F. Supp. 100, 102 (N.D. Tex. 1988) ("the Act protects individuals in whose name the financial account is held") (emphasis omitted); Duncan v. Belcher, 813 F.2d 1335, 1338-39 (4th Cir. 1987) (same).

The RFPA "carefuily limits the kinds of customers to whom it applies, and the types of records they may seek to

protect." Securities & Exch. Comm'n v. Jerry T. Obrien, Inc., 467 U.S. 735, 745 (1984) (citations omitted); see Spa Flying Serv., Inc. v. United States, 724 F.2d 95, 96 (8th Cir. 1984) (corporation is not a customer since it is not enumerated in definition of "person" in the Act); Pittsburgh Nat'l Bank v. United States, 771 F.2d 73, 76 (3rd Cir. 1985) (same). Since the beneficiaries did not maintain accounts in their own names, they are not customers within the meaning of the statute even though they arguably "utilized a[] service" of the bank.

Because the Act does not apply, we need not decide whether seizure of funds constitutes the transfer to the government of "information" or "financial records." Cf. United States v. Eighty-Eight (88) Designated Accounts Containing Monies Traceable to Exchs. for Controlled

Substances, 740 F. Supp. 842, 851 & n.15 (S.D. Fla. 1990) (court in seizure case concerned about government's "apparent violation of the RFPA"). Nor is it necessary to decide whether the litigation exception could apply in an in rem proceeding nominally one by the government against the funds -- that is, whether the beneficiaries of wire transfers can be considered "parties." See 12 U.S.C. § 3413(e) (1988 & Supp. III 1991).

B. OMNIBUS CRIME CONTROL AND SAFE STREETS ACT

Plaintiffs also claim that the banks, in seizing the wire transfers of funds, violated the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510 et seq. (1988 & Supp. III 1991). That statute was amended in 1986 by the Electronic Communications Privacy Act

[ECPA], which was passed on October 21, 1986 and became effective 90 days later. Congress broadened the prior reach of the statute to cover many new developments in technology. The legislative history points out that the amendment is designed to

> Update and clarify Federal privacy protections and standards inlight of dramatic changes in new computer and telecommunications technologies.

1986 U.S. Code Cong. & Admin. News 3555, 3555. Before amendment the Act prohibited only the "aural" interception of wire and oral communications and protected only those wire communications sent by common carriers. The impetus for amendment was the need to protect privacy while keeping pace with modern technology, but the amendment may have reduced privacy protection. See generally Russell S. Burnside, The

Electronic Communications Privacy Act of 1986: The Challenge of Applying Ambiguous Statutory Language to Intricate Telecommunication Technologies, 13 Rutgers Computer & Tech. L.J. 451, 494-95 (1987) (1986 Act cured "ambiguities and antiquities of the 1968 Act . . . [but] at the expense of privacy protections"); Fred Jay Meyer, Don't Touch That Dial: Radio Listening Under the Electronic Communications Privacy Act of 1986, 63 N.Y.U. L. Rev. 416, 434 (1988) (arguing that although the 1986 bill was intended to curb increasing surveillance, it "came to embody the Justice Department's wish list" with concomitant reduced privacy protections); L. Tribe, The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontiers, Keynote Address at the First Conference on Computers, Freedom and Privacy (proposing

Constitutional amendment to address conjunction of privacy and technology), cited in Robert Garcia, "Garbage In, Gospel Out": Criminal Discovery, Computer Reliability, and the Constitution, 38 UCLA L. Rev. 1043 (1991).

The statute as amended now prohibits the interception of "electronic communications" as well as oral and wire communications. It applies to a wide range of new technologies, including electronic mail and bulletin boards, computer-to-computer communications, remote computer services, cellular telephones, portions of cordless telephone communications, pen registers, trap and trace devices, and certain kinds of pagers and satellite transmission. 1986 U.S. Code Cong. & Admin. News 3555, 3562-65. As pointed out in the legislative history:

> Today we have large-scale electronic mail operations, computer-to-computer data transmission, cellular and cordless telephones, paging devices, and video teleconferencing. A phone call can be carried by wire, by microwave or fiber optics. It can be transmitted in the form of digitized voice, data or video.

Id. at 3556 (citation omitted). An electronic communication is defined as

> any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system . . . .

18 U.S.C. § 2510(12) (1988 & Supp. III 1991). It includes digital and scrambled symbols. Id. § 2510(16)(A). Bank-to-bank funds transfers and transmission of financial records were intended to be protected electronic communications under the amended statute. See 1986 U.S. Code Cong. & Admin. News 3555, 3562.

Further technological advancements will raise new problems. For example,

whereas in earlier days eavesdroppers needed to tap the lines of a computer directly, now they can intercept the electromagnetic radiation emitted by computers and their peripherals, either actively from cables or passively as the radiation moves through the ether. See Christopher J. Seline, Eavesdropping on the Compromising Emanations of Electronic Equipment: The Laws of England and the United States, 23 Case W. Res. J. Int'l L. 359, 360 & nn.8-9 (1991); see also Russell S. Burnside, The Electronic Communications Privacy Act of 1986: The Challenge of Applying Ambiguous Statutory Language to Intricate Telecommunication Technologies, 13 Rutgers Computer & Tech. L.J. 451, 497-98 (1987) (certain distinctions the 1986 statute makes among various electronic devices are already obsolescent). It has been suggested that

in the twenty-first century specialized hardware and software, connected by wires, radio waves, and infrared, will be so ubiquitous that no one will remark their presence. Mark Weiser, The Computer for the 21st Century, in Scientific American, at 93 (Sept. 1991). Such devices will keep track of individuals and objects, their location and function, without any awareness on the part of subjects that they are being monitored. Id.

That the statute was amended to keep pace with technological advancements does not change its purpose and scope. Usually known as the federal wiretap act, the statute was designed by Congress to create a uniform system to govern electronic surveillance. See 1968 U.S. Code Cong. & Admin. News 2112, 2153, Cited in United States v. Clemente, 482

F.Supp. 102, 106 (S.D.N.Y. 1979), aff'd, 633 F.2d 207 (2d Cir. 1980). The Act "represent[ed] an attempt by Congress to establish a system of electronic surveillance subject to rigorous safeguards." Clemente, 482 F.Supp. at 106; see also United States v. Tortorello, 480 F.2d 764, 773 (2d Cir.) ("The Act represents an attempt by Congress to establish a limited system of electronic surveillance . . . ."), cert. denied, 414 U.S. 866 (1973).

The Eleventh Circuit in United States v. Herring, 933 F.2d 932 (11th Cir. 1991), in a case interpreting another section of the statute which describes prohibited devices, addressed the question whether the 1986 amendments "changed the nature of the statute." Id. at 934. At issue were the convictions of defendants in the district court for

selling devices that unscramble satellite pay-television transmissions. Noting that the 1986 amendments simply substituted "intentionally" for "wilfully" and added "or electronic" to the list of kinds of communications, the court concluded that the amendments effected no other change in the statute's scope. Id. at 934-35; see also Christopher J. Seline, Eavesdropping on the Compromising Emanations of Electronic Equipment: The Laws of England and the United States, 23 Case W. Res. J. Int'l L. 359, 375 (1991) ("[the 1986] Act did not modify the main concerns of Title III"). The statute continues to be directed at regulating surveillance through prohibiting the interception of the contents of communications by any electronic, mechanical, or other device. 18 U.S.C. § 2510(4) (1988 & Supp. III

1991).

The seizure of electronic funds transfers by banks following government and court instructions in forfeiture proceedings is not within the ambit of the wiretap statute. Forfeiture proceedings are not surveillance. In these Bank Cases, since the funds and the transfers were being claimed in good faith as belonging to the government, obtaining information on their destination and taking them into government possession was not a violation of the statute.

There is little doubt that the war on drugs, including the skirmishes around forfeitures, has reduced the law's privacy protections. See generally United States v. Glover, ___ F.2d ___, ___, 1992 WL 29046, at *16 (2d Cir. 1992) (Oakes, C.J., dissenting) ("One would

hope that the war on drugs does not make for a police state . . . ."); United States v. Monsanto, 924 F.2d 1186, 1204 (2d Cir.) (Oakes, C.J. dissenting) (disagreeing with majority's decision in light of "the squeeze already exerted on prosecutorial and judicial resources by the flood of narcotics cases inundating the federal courts"), cert. denied, 112 S. Ct. 382 (1991); United States v. Riley, 906 F.2d 841, 850 (2d Cir. 1990) (Weinstein, J., dissenting) ("Precisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great.") (citing Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (Marshall, J., dissenting)). Nevertheless, there is no warrant in the wiretapping or electronic eavesdropping provisions to protect those Omnibus Crime

Control and Safe Streets Act as amended and the forfeiture statutes, Congress will have to act to provide further protection to claimants.

The wiretap act has no application because funds in forfeiture proceedings are deemed to belong to the government at the time of their criminal use. The statute cannot apply where, as here, the government reasonably viewed the funds as its own. The concept that ownership of the object is transferred instantaneously at the time of criminality provides a conceptual distinction making the laws governing wiretapping and interference with communications irrelevant.

Even if the statute applied, the banks would not be subject to liability. As noted above, the 1986 amendments substituted "intentionally" for "willfully." Since the instant funds

were already forfeited to the government as a result of their illegal genesis, the government's intent was to seize its own funds. The banks had no independent intention other than to follow the directions of the United States Attorney. The banks should face no liability where they intentionally acted within their perceived legal obligations by following the instructions of the United States Attorney and the court.

Moreover, under the statute there is no liability where a party to the transfer intercepts the communication by consent or under color of law:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

18 U.S.C. § 2511(2)(c) (1988 & Supp. III

1991). No cause of action may be maintained against private actors where they are ordered by government authorities to intercept communications. See Camacho v. Autoridad de Telefonos, 868 F.2d 482, 489-90 (1st Cir. 1989) (telephone companies entitled to immunity under that section when acting at the direction of federal officers). Nor is there liability for the interception of electronic communications in transit or in electronic storage where one party to the communication consented to access. See American Computer Trust Leasing v. Jack Farell Implement Co., 763 F. Supp. 1473, 1494-95 (D. Mn. 1991). The banks, and not the beneficiaries, were parties to the communication and consented to the interception. They acted at the direction of the United States Attorney as to funds the government claimed as its

own.

Another provision of the statute specifically exempts from liability the providers of an electronic communication service who act at the direction of a court order:

> Notwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications . . . if [the above enumerated persons have] been provided with--
>
> (A) a court order directing such assistance signed by the authorizing judge . . . .

18 U.S.C. § 2511(2) (a) (ii) (1988 & Supp. III 1991). The banks, as providers of an electronic communication service, are authorized under the statute to assist the law enforcement agents in the interception of communications.

Good faith reliance on a court

warrant or order is also a complete defense under the statute. 18 U.S.C. § 2520(d) (1988 & Supp. III 1991); see also id. § 2707(d)(1) (same defense for interception of stored electronic communications). These Bank Cases are analogous to Jacobson v. Rose, 592 F.2d 515 (9th Cir. 1978), cert. denied, 442 U.S. 930 (1979), where a telephone company received a court order requesting it to assist county officials with a wiretap. The telephone company asked the officials to redraft the order to ensure that no law was being violated. Similarly, in these Bank Cases, the banks received the complaints and warrants and they requested assistance from the United States Attorney to clarify the instructions. One bank employee declared: "we talked to [the United States Attorney] in order to have a

clarification of the test of the subpoena."

The banks, like the telephone company in Rose, are protected because of their reasonable belief that they were acting in compliance with a lawfully issued court order. 592 F.2d at 523-24; see also Smith v. Nixon, 606 F.2d 1183, 1191 (D.C. Cir. 1979) (telephone company's reasonable expectation of legality when acting pursuant to Executive direction prevented any liability for alleged Constitutional or statutory violation), cert. denied, 453 U.S. 912 (1981); Citron v. Citron, 539 F.Supp. 621 (S.D.N.Y. 1982), aff'd, 722 F.2d 14 (2d Cir. 1983) (same under wiretap statute before amendment), cert. denied, 466 U.S. 973 (1984); Wright v. State of Florida, 495 F.2d 1086, 1090 (5th Cir. 1974); (dicta) (good faith

reliance on a court order is a defense under the Fourth Amendment and under the wiretap statute); cf. Kratz v. Kratz, 477 F. Supp. 463, 479-80 (E.D. Pa. 1979) (dicta) (reasonable reliance on an opinion of a United States Court of Appeals may be proper basis for good faith defense).

It is unnecessary to address the defendants' remaining argument, that they could not have "intercepted" the electronic communications since they were in fact the intended recipients.

C. FEDERAL RESERVE ACT

Plaintiffs assert in a conclusory fashion that the seizure of funds violated Regulation J of the Federal Reserve Act, which "governs the collection of checks and other cash and noncash items by Federal Reserve Banks."

12 C.F.R. § 210 et seq. (1985). Regulation J was promulgated to "define more precisely the terms and conditions under which the Reserve banks receive and handle for collection [such] items." Colonial Cadillac, Inc. v. Shawmut Merchants Bank, N.A., 488 F. Supp. 283, 284 (D. Mass. 1980) (citing 32 C.F.R. § 6210). The provisions of Regulation J serve to "limit liability of a Federal Reserve bank." Appliance Buyers Credit Corp. v. Prospect Nat'l Bank, 505 F. Supp. 163, 164 (C.D. Ill. 1981) (depositor of a sending bank is not a "sender" as defined in 12 C.F.R. § 210.2(e)), aff'd, 708 F.2d 290 (7th Cir. 1983); see also Washington Petroleum & Supply Co. v. Girard Bank, 629 F. Supp. 1224, 1229-30 (M.D. Pa. 1983) (same); Childs v. Federal Reserve Bank, 719 F.2d 812, 814 (5th Cir. 1983) ("Regulation J .

. . enables the federal reserve system to perform its check collection and clearinghouse functions . . . ."); Colonial Cadillac, 488 F. Supp. at 285 (remote parties protected). Plaintiffs have failed to prove that the Federal Reserve Act has any application to the seizure of wire transfers by intermediary banks in forfeiture proceedings.

D. FOREIGN INTELLIGENCE SURVEILLANCE ACT

The Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801 et seq. (1988), relied upon by the plaintiffs, has no bearing on this case. The government and banks were overseeing transfers of what the government considered its own funds.

V. STATE LAW CLAIMS

A. NEW YORK RIGHT TO PRIVACY

Plaintiffs claim that the banks' seizure of wire transfers violated their right to privacy. Whether viewed as a common law cause of action or a state statutory cause of action, plaintiff's complaint fails to state a claim. There is no common law right to privacy in the State of New York. See Young v. United States Dep't of Justice, 882 F.2d 633, 641 (2d Cir. 1989), cert. denied, 493 U.S. 1072 (1990) (citing New York cases); Cohen v. Hallmark Cards, 45 N.Y. 2d 493, 497 n.2 (Ct. App. 1978). Although there is a statutory right to privacy, it is restricted to "cases involving unauthorized use of person's name or likeness." Young, 882 F.2d at 641 (citing N.Y. Civ. Rights Law §§ 50-51).

B. U.C.C. ARTICLE 4-A

Article 4-A of the Uniform Commercial Code was enacted in the State of New York with an effective date of January 1, 1991. Article 4-A for the first time put into place specific rules for the regulation of funds transfers. It cannot be relied upon in the instant case since the wire transfers were seized in July and August of 1990. The statute does not apply retroactively. See Banque Worms v. BankAmerica Int'l, 568 N.Y.S. 2d 541, 547 (Ct. App. 1991).

In any event, section 4-A-503 of the U.C.C., entitled "Injunction or Restraining Order With Respect to Funds Transfer," recognizes that banks have an obligation to respond to court orders. See Thomas J. Greco, Miscellaneous Provisions: Creditor Process, Injunction, Finality of Account Statement, and Choice

of Law, in Bankers Guide, supra, at 56. The Official Comment states that "intermediary banks are protected," meaning that since the time in transit for funds transfers is brief, intermediary banks cannot be expected to comply with injunctions by creditor. Instead, creditor process should be directed at the originating and receiving banks. The Comment suggests that intermediary banks should not be exposed to liability under article 4-A for declining to stop funds transfers where creditors are seeking the funds. In the instant case, the opposite situation is presented. Plaintiffs wish to hold the intermediary banks liable for agreeing to seize the funds. No such liability is justified. Article 4-A was enacted to enable all parties to funds transfers to "predict risk with certainty, to insure

against risk, to adjust operational and security procedures, and to price funds transfer services accordingly." Official Comment to U.C.C. § 4-A-102. The policies of article 4-A are served by protecting the intermediary banks in forfeiture cases. The courts should hesitate to provide restrictions on their own powers to act swiftly. Cf. Sir Nicolas Browne-Wilkinson, Territorial Jurisdiction and the New Technologies, 25 Israel L. Rev. 145, 147 (1991) ("[T]he speed at which modern technology works is . . . threatening the roots of justice itself."). Finally, even if the U.C.C. were applicable, under the Supremacy Clause a state could not in its regulation of commercial activity inhibit federal law enforcement agencies in applying federal drug laws.

C. CONVERSION

Plaintiffs allege a cause of action for conversion against the defendant banks. Conversion requires the intentional deprivation of the property of another with intent to retain it permanently. See In re Di Crocco's Estate, 12 N.Y.S. 2d 276, 278 (Surr. Ct. 1939); see, e.g., Shawmut Worcester County Bank v. First Am. Bank & Trust, 731 F. Supp. 57, 59-60 (D. Mass. 1990) (conversion claim may be cognizable, but no conversion under the facts of the case, where bank refused to reverse wire funds transfer); cf. 1 W. Hawkland, F. Leary & R. Alderman, Conversion by Representatives Including Depositary and Collecting Banks, U.C.C. Series § 3-419:05 (1982-86).

No conversion by the banks took place. Although the banks did seize the

wire transfers of funds, they promptly paid the moneys to the Clerk of the Court for safekeeping during the pendency of the litigation. There was never an intention by the banks to take title for themselves or on behalf of anyone else. Cf. Bradley v. Roe, 282 N.Y. 525, 532 (Ct. App. 1940) ("placing property in the custody of the court is, it is plain, not an assertion of dominion over the property to the exclusion of the real owner"). In effect, there were two parties contending they owned the funds -- the government and the claimants. The banks turned the funds over to the courts in a kind of interpleader. In any event, no claim for conversion is possible in forfeiture proceedings, since the defendant property ceases to belong to the claimant at the moment the crime is

committed.

D. THIRD-PARTY BENEFICIARY

Where a contract is formed for the benefit of a third person, that person should have a right of action against a promisee who fails to perform. 2 Samuel Williston, A Treatise on the Law of Contracts § 347 et seq. (3d ed. 1959). Plaintiffs claim that as third-party beneficiaries of a contract between the banks, they have a cause of action against the banks that failed to turn over the funds.

Generally, it is the originator's and not the beneficiary's claims against an intermediary bank which are allowed to stand. See, e.g., Security Funds Servs. v. American Nat'l Bank & Trust Co., 542 F. Supp. 323, 329 (N.D. Ill. 1982) (initiator of transfer could be a third-

party beneficiary). But see Worldwide Sugar Co. v. Royal Bank, 609 F. Supp. 19, 25 (S.D.N.Y.) (no manifest intention to benefit third-party in letter-of-credit arrangement), aff'd, 751 F.2d 373 (2d Cir. 1984). The plaintiffs here have made no showing that they are not only the beneficiaries but also the originators of the wire transfers.

In a forfeiture proceeding, the claims of plaintiffs as beneficiaries of wire transfers are meaningless. As noted above, at the moment a crime is committed the property ceases to belong to the claimant. If it is determined at trial that the funds are traceable to narcotics trafficking, the money will be declared the property of the government ab initio. Then several defenses or excuses would nullify or bar enforcement of the contract. For example, where the subject

matter of a contract is illegal, there is no enforceable contract. Where performance is impossible, it is excused. Cf. United States v. Rod & Reel Fish Camp, 660 F. Supp. 483, 487 (S.D. Miss.) (third parties cannot acquire legal interest in property after date of illegal act since forfeiture occurs as of that time), dismissed, 822 F.2d 57 (5th Cir.), remanded, 813 F.2d 566 (5th Cir. 1987).

As of this moment, probable cause having been found for the seizure of the funds, the claim of the government, not of the plaintiffs, is the only one appropriate for recognition under the third-party contract rubric.

E. NEGLIGENCE CLAIMS

Like the other causes of action, plaintiffs' negligence and gross

negligence causes of action stem from the seizure of wire transfers of funds by the defendant intermediary banks. Courts have upheld negligence actions against banks for failing to effectuate electronic funds transfers. See, e.g., Bradford Trust Co. v. Texas Am. Bank-Houston, 790 F.2d 407, 411 (5th Cir. 1986) (negligence claims may stand against bank which honored fund transfer requests of imposter); Compania Anonima Venezolana de Navegacion v. American Express Int'l Banking Corp., 1985 WL 1898, at *5 (S.D.N.Y. 1985) (denying summary judgment because of possible negligence of bank in failing to transmit telex); Security Funds Servs. v. American Nat'l Bank & Trust Co., 542 F. Supp 323, 327 (N.D. Ill. 1982); Evra Corp. v. Swiss Bank Corp., 522 F. Supp. 820, 828-29 (N.D. Ill. 1981), aff'd in part, vacated

in part, rev'd in part, 673 F.2d 951 (7th Cir.), cert. denied, 459 U.S. 1017 (1982); Central Coordinates, Inc. v. Morgan Guar. Trust Co., 494 N.Y.S. 2d 602, 605 (N.Y. Sup. Ct. 1985) (negligence claim cognizable, but none found where it was the plaintiff who was in a better position to avoid the consequences of nondelivery of funds or failure to notify of transfer).

In negligence actions against the banks, as in the third-party contract actions discussed above, it is the originator of the funds transfer who is permitted to maintain the cause of action. In Evra, for example, the district court held that the sending bank was under a duty to exercise ordinary care to ensure that the funds transfer was effected in a proper and timely manner. 522 F. Supp. at 829.

In the instant case, defendants were not rogue banks seizing funds carelessly or without justification. The intermediary banks were following the precise oral and written instructions of the United States Attorney and the court. Even if the banks can be considered to have a duty to the beneficiaries who were not their customers (a proposition not without controversy), they did not violate the duty of care.

The banks were directed in a showing of apparent authority to seize the funds. Cf. Clayton Brokerage Co. v. Clement, 87 F.R.D. 569, 570 (D. Md. 1980) (dicta) (bank has no justification for refusing to comply with subpoena issued in civil action). They do not have all the relevant information and cannot make an independent determination of merit.

Moreover, wire transfers occur at

such speed, see Delbrueck & Co. v. Manufacturers Hanover Trust Co., 609 F.2d 1047, 1049 n.1 (2d Cir. 1979), that the banks could not, even if they wished, take the time to evaluate orders before deciding whether to comply. Courts recognize that, at least vis-a-vis government action, the nature of the property to be seized may justify swift action. See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679 (1974); United States v. 4880 S.E. Dixie Highway, 612 F. Supp. 1492, 1498 (S.D. Fla. 1985) (government may "act first and seek judicial approval later" where movable nature of res suggests exigent circumstances). Where the property is "of a sort that could be removed to another jurisdiction, destroyed, or concealed," Calero-Toledo, 416 U.S. at 679, notice or delay would compromise the

government's enforcement goals. Cf. Sir Nicolas Browne-Wilkinson, Territorial Jurisdiction and the New Technologies, 25 Israel L. Rev. 145, 149-52 (1991) (speed of electronic transfers has required the Chancery Court of the High Court in London to expand its jurisdiction over foreign funds).

Generally, it is only where a residence is at stake that courts recognize the necessity of preliminary notice and hearing before seizure. See United States v. 4492 South Livonia Rd., Livonia, N.Y., 889 F.2d 1258, 1265 (2d Cir. 1989) (contrasting proceeding against home with proceeding against funds; in the latter, government may forgo pre-seizure hearing). But see United States v. 16 Clinton Street, N.Y., N.Y., 730 F. Supp. 1265, 1271-72 (S.D.N.Y. 1990) (seizure of building that

contained stores in addition to apartments valid even without notice and hearing). See generally Jack Yoskowitz, The War on the Poor: Civil Forfeiture of Private and Public Housing, 1992 Colum. J.L. & Soc. Probs. (forthcoming). By contrast, electronic funds transfers occur almost instantaneously. The government must be permitted to act swiftly. There is no time or warrant for any independent evaluation by the banks that would interfere with execution of national forfeiture policy. The claimants can and should look for protection in proceedings involving the government as they are now doing in the All Funds case.

The banks were acting as agents of the court and should be protected. Cf. K/S Norman Agather v. Sea Trade & Constr., Ltd., 767 F. Supp. 60, 62-63

(S.D.N.Y. 1991) (bank was acting as agent of the court when it executed writ of attachment and as such should be protected); Camacho v. Autoridad de Telefonos, 868 F.2d 482, 489-90 (1st Cir. 1989) (semi-public telephone companies immune from liability where following directives of federal agents). The ability of intermediary banks to rely on court orders without risk of liability is essential to the financial health of this industry. Jeffrey S. Tallackson & Norma Vallejo, International Commercial Wire Transfers: The Lack of Standards, 11 N.C. J. Int'l L. & Com. Reg. 639, 665 (1986).

VI. CONCLUSION

Plaintiffs have failed to state a claim under any state or federal theory. No liability can be found where the banks

were in good faith following government orders respecting claimed government funds. There is not the slightest suggestion of bad faith by the banks. Summary judgment for the defendants is granted. The complaint is dismissed.

SO ORDERED.

Jack B. Weinstein
United States District Judge

Dated: Brooklyn, New York
February 27, 1992

APPENDIX-B

RKW

UNITED STATE COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the 30th day January, one thousand nine hundred and ninety-five.

Present:

Honorable Ellsworth A. Van Graafieland
Honorable Ralph K. Winter,
Honorable Pierre N. Leval,
Circuit Judges.

MANUFACTURAS INTERNACIONALES LTDA; ABUCHAIBE HNOS LTDA; COMERCIAL SAMORA LTDA; CREACIONES VIVIANA LTDA; COMERCIAL ESTRELLA LTDA; CONFECCIONES Y TEJIDOS NACIONALES LTDA; MANUFACTURERA DEL ATLANTICO LTDA; AND INDUSTRIAS MARATHON LTDA,

plaintiffs-Appellants.

v.

ORDER
#92-7360

MANUFACTURERS HANOVER TRUST BANK COMPANY; BANCO ATLANTICO ;and THE BANK OF NEW YORK,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Manufacturas Internacionales Ltda, Abuchaibe Hnos Ltda, Comercial Samora Ltda, Creaciones Viviana Ltda, Comercial Estrella Ltda, Confecciones y Tejidos Nacionales Ltda, Manufactura del Atlantico Ltda, and Industrias Marathon Ltda appeal from Judge Weinstein's grant of summary judgment in favor of the Manufacturers Hanover Trust Bank Compa

ny, Banco Atlantico, and the Bank of New York (the "Banks"). See Manufacturas Int'l, Ltda v. Manufacturers Hanover Trust Co., 792 F. Supp. 180 (E.D.N.Y. 1992) (Consolidated Bank Cases). Appellants contend that the district court erred in granting summary judgment on their claims brought pursuant to 18 U.S.C. §2520, which governs interception of wire electronic communications, and on their claims brought pursuant to 18 U.S.C. §2707, which governs access to certain stored electronic records.

We begin with appellants' claims for civil damages under Section 2520, which authorizes a civil action for violations of the wiretap act, 18 U.S.C. §2510 et seq. This is the third occasion that this court has reviewed the seizure and forfeiture of electronic

fund transfers ("EFTs") stemming from a 1990 civil forfeiture action directed at money laundering by the Cali cocaine cartel. In United States v. Daccarett, 6 F. 3d 37 (2d Cir. 1993), cert.denied, 114 S.Ct. 1295 (1994), these very same appellants sought to overturn the civil forfeiture of the EFTs on the ground that the EFTs seized from the three Bank were protected under the Electronic Communications Privacy Act ("ECPA"), which updated the wiretap act. the ECPA prohibits interceptions of electronic communications, see 18 U.S.C. §2511(1); "intercept" is defined as "the aural or other acquisition of the contents of any wire, electronic, or oral communications through the use of any electronic, me chanical, or other device." Daccarett 6 F.3d at 54 (quoting 18 U.S.C. §2510

(4)) (emphasis added in Daccarett). In Daccarett, we held that "[l]iability under the ECPA is... predicated on the use of a `device', "and since no `device' was used "to obtain the EFTs and information, no `interception' occurred." Id. Because appellants were parties in Daccarett, appellants' claims under Section 2520 are barred by the doctrine of issue preclusion.

Appellants urge reversal on the ground that the district court's ruling was made on the basis of the relation-back doctrine, whose parameters were subsequently clarified by the Supreme Court in United States v. 92 Buena Vista Avenue, 113 S. Ct. 1126 (1993). Howev er, in Daccarett, we expressly confronted the discrepancy between the district

court's treatment of the relation-back doctrine in Consolidated Bank Cases, 792 F.Supp. at 192, and in the related forfeiture proceeding, United States v. All Funds on Deposit in Any Accounts Maintained at Merrill Lynch, Pierce, Fenner & Smith, 801 F. Supp. 984 (E.D.N.Y. 1992) (All Funds), and the Supreme Court's decision in 92 Buena Vista Avenue. In Daccarett, which affirmed the judgment in All Funds, we rested our decision with respect to the Electronic Communications Privacy Act on grounds different from those of the district court: As stated, we found that "no `interception' occurred," Daccarett, 6 F. 3d at 54, so the wiretap act was not violated.

we now turn to appellants' claims under Section 2707, which provides a

civil cause of action for unlawful access to stored communications in violation of Section 2701. Good faith reliance on a court warrant or order is a complete defense under the statute. See 18 U.S.C. §2707 (d) (1). The district court held that the three Bank were "protected because of their reasonable belief that they were acting in compliance with a lawfully issued court order."

Consolidated Bank Cases, 792 F. Supp. at 193. The record Supports this finding of good faith, with no need additional discovery.

We therefore affirm.

Ellsworth A. Van Graafeiland, U.S.C.J.

Ralph K. Winter, U.S.C.J.

Pierre N. Leval, U.S.C.J.

APPENDIX-C

Reported at: 801 F. Supp 984
(E.D.N.Y. 1992)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

ALL FUNDS ON DEPOSIT IN ANY ACCOUNTS MAINTAINED AT MERRILL LYNCH, PIERCE,FENNER & SMITH, ET AL.,

Defendants.

MEMORANDUM AND ORDER
CV-902510

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WEINSTEIN, J.:

This case reveals the sophisticated financial operations of an international criminal syndicate. It involves more than ten million dollars in wire transfers and deposited funds seized by the government as the traceable proceeds of illegal

money-laundering and narcotics transactions. The moneys were alleged by the government to be subject to forfeiture under 21 U.S.C §881 et seq (1988 & Supp. III 1991), and 18 U.S.C. § 981 et seq. (1988 & Supp. III 1991). Claimants had the burden at trial of proving either that each amount was not traceable to drug sales or that the claimants were unaware of the taint. After a two-month trial, the jury found that eighteen of the twenty-two amounts seized were forfeitable. For three amounts claimed by two claimants the jury determined that the funds were not the traceable proceeds of illegal money-laundering and narcotics transactions, and for one amount the jury found that the claimant was an innocent owner.

Claimants who received an adverse jury decision move for judgment

notwithstanding the verdict or for a new trial; those motions are denied. Their motions to stay execution of the judgment during the appeal without posting a supersedeas bond are granted. Claimants supported by the jury verdict move to release the res; that motion is granted. The government moves to stay payment of proceeds to two claimants on the ground that they are represented by a fugitive; that motion -- perhaps the most interesting in the case -- is denied.

I. FACTS

Most of the funds seized and forfeited are the proceeds of a well-organized multinational organization based in the city of Cali, Colombia and led by a fugitive named Jose Santa Cruz Londono. Londono and others conducted extensive narcotics trafficking and

money-laundering activities involvin hundreds of millions of dollars an thousands of kilograms of cocain smuggled into the United States.

The Londono organization utilize many sophisticated strategies to launde narcotics proceeds. Electronic fund transfers from companies nominally in th clothing manufacturing or import-expor business moved currency internationally cars filled with cocaine were driven fro Florida to New York, where the drugs were exchanged for cash and driven back t Florida (with the money at times smellin so strongly of drugs and drug-processin ingredients that it had to be literall washed before it could be counted); shel corporations in Panama and Colombi electronically transferred money t Europe and elsewhere; huge amounts o cash were flown by plane to Panama,

unloaded, and deposited in banks accustomed to such practices; drug dollars were exchanged on the black market in Colombia for Colombian pesos; shipments of manufactured goods from Colombia to Panama were "lost" to cover up dollar transfers; "loans" were made and paid the same day; and many other procedures were used to disguise the true source and nature of the funds.

Extensive corporate and banking records from all over the world were the primary basis for the government's case. Claimants used corporate records, letters rogatory, testimony of those with knowledge of claimants' activities, and still and video pictures purporting to show the operations of their manufacturing plants in Colombia.

The Chief of the Drug Enforcement Administration Financial Intelligence

Group, Cheryl Holmes, testified at trial after reviewing the voluminous bank and corporate records seized. She traced the links between numerous Panamanian shell corporations, which sent and received electronic funds transfers, and the Londono enterprise. Certified Public Accountant Aram Kostoglian, another government witness, testified that the cash receipts, corporate records, and bank statements of the claimant corporations were inconsistent with the types of records held by legitimate companies in Colombia and elsewhere. Several former Londono associates who had pled guilty also testified at trial to the illegal nature of the various enterprises utilized by claimants; one, who dealt in gold as a cover-up, described the counting and re-packaging of huge stacks of United States currency.

In connection with the money-laundering scheme, substantial sums of money were electronically transferred into and out of bank accounts in many countries including the United States. See generally Manufacturas International Ltda v. Manufacturers Hanover Trust Bank, et al. (Consolidated Bank Cases), __ F. Supp. __, 1992 WL 96212 (E.D.N.Y. 1992) (describing the wire transfers). Officials of several European countries began cooperating in 1989 investigating the suspected drug-money-laundering activities of Jose Santa Cruz Londono. The inquiry began in Luxembourg and culminated in the seizure of funds in New York and abroad during the summer of 1990.

In September 1989, using a wiretap the Luxembourg Surété Publique intercepted a telephone call between

Londono in Colombia and Jose Franklin Jurado-Rodriguez, a Londono associate, in Luxembourg. Jurado reported to Londono that he had successfully opened bank accounts using the name of Londono's father-in-law, and that he planned to set up several shell companies to assist in the money-laundering enterprises. The Surété learned through wiretaps and faxtaps that another Londono associate, Edgar Alberto Garcia-Montilla, was opening bank accounts throughout Europe in the names of Londono's parents-in-law, Heriberto Castro-Mesa and Esperanza Rodriguez de Castro.

In June 1990, Jurado, Garcia, and a third associate Ricardo Mahecha-Bustos, were observed by European law enforcement officers during a ten-day period traveling and depositing large sums of money in accounts in Italy, Luxembourg,

Belgium, Denmark, Sweden, Germany, and the Netherlands. They were arrested when they returned to Luxembourg on money-laundering charges after a lengthy trial.

Heavy wire transfer activity followed the three arrests. Using memoranda and bank records seized at the time of the arrests, officials from several countries were able to identify bank accounts around the world connected to the complex drug money-laundering scheme. In July and August 1990 approximately thirty million dollars was seized in Europe and sixteen million dollars was seized in Panama. In the United States, several American banks having correspondent banking relationships with Panamanian and Colombian banks were instructed by the United States Attorney to seize certain funds on deposit and wire transfers. The

seized funds, totaling over ten million dollars, were the subject of this All Funds action.

Pursuant to a succession of amended complaints and supplemental warrants the banks were ordered by the United States Attorney to attach the identified accounts and wire transfers and pay the money into court pending the outcome of a plenary trial. In a separate action by claimants against the banks which seized the funds, summary judgment was granted for the defendant banks. See Manufacturas International Ltda v. Manufacturers Hanover Trust Bank, et al. (Consolidated Bank Cases), __ F. Supp. __, 1992 WL 96212 (E.D.N.Y. 1992). Another related action, by claimants against the United States Attorneys who ordered the banks to seize the funds, was dismissed for failure to state a claim.

Abuchaibe Hnos. v. Maltz et al., CV 92-528 (oral decision).

Testimony at trial revealed an officially sanctioned parallel unofficial street market in dollars in Colombia. There was testimony that it is common knowledge in the streets and board rooms of Colombia that the source of the millions of American dollars in circulation in this "black" market is largely the drug trade in New York and other American cities.

II. LAW

As the "drug was" has escalated, the number of forfeiture cases in the United States has burgeoned. Taking away the profits of drug crimes through forfeiture is a powerful weapon to cripple drug-trading enterprises. Unfairly wielded it can place commercial enterprises at a

terrible disadvantage. It skirts the edge of due process. See, e.g., United States v. $8,850 in United States Currency, 461 U.S. 555, 565-66 (1983) (balancing test set out in speedy trial context in Barker v. Wingo, 407 U.S. 514, 530 (1972), applies to determine reasonableness of delay in forfeiture proceedings). Even when a claimant is successful in fending off ultimate forfeiture, the loss of use of the seized funds for months or years while the case drags on can cripple a business. See id. at 565 ("Being deprived of this substantial sum of money for a year and a half is undoubtedly a significant burden."). The substantive law, procedures, and allocation of burdens of proof in forfeiture cases differ markedly from other civil proceedings, and give the United States prosecutor a

substantial edge. See generally Edward M. Genson & Mark W. Martin, A Guide to Handling Federal Narcotics Forfeiture Cases, 79 Ill. B.J. 180 (1991) (discussing forfeiture procedures).

The government brought these proceedings under 21 U.S.C. § 881(a)(6), which provides for the forfeiture of

> [a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance . . . [and] all proceeds traceable to such and exchange . . .

The procedures applied in civil forfeiture proceedings are those "law[s] relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs law." 21 U.S.C. § 881(d); United States v. $2,500 in United States Currency, 689 F.2d 10, 12 (2d Cir. 1982), cert. denied sub nom. Aponte v. United States, 465

U.S. 1099 (1984).

Burdens of proof are allocated by 19 U.S.C. § 1615. Under that section, the burden of proof is on the claimant, "[p]rovided that probable cause shall be first shown for the institution of such suit or action, to be judged . . . by the court." To begin forfeiture proceedings the government must first demonstrate that there was probable cause to institute the action. It must demonstrate that there are "reasonable grounds" to believe that the property is subject to forfeiture. United States v. Banco Cafetero Panama, 197 F.2d 1154, 1160 (2d Cir. 1986). "These grounds must rise above the level of mere suspicion but need not amount to . . . 'prima facie proof.'" Id.

The reasonable ground standard is less stringent than the preponderance of

the evidence standard. United States v. 303 W 116th Street, N.Y., N.Y., 901 F.2d 288, 291 (2d Cir 1990). The government need not link the funds to a particular narcotics transaction, but rather must "connect the property with narcotics activity . . . ." Banco Cafetero, 797 F.2d at 1160. In satisfying its burden, the government may demonstrate probable cause that the property itself, apart from the actions of the owner, is connected to narcotics activity. See id.; see also United States v. One 1978 Chrysler LeBaron, 531 F. Supp. 32, 34 (E.D.N.Y. 1981) (innocence of owner does not by itself prevent forfeiture). This reflects the legal fiction that the object itself is the wrongdoer. Manufacturas International Ltda v. Manufacturers Hanover Trust Bank, et al. (Consolidated Bank Cases), __ F. Supp.

__, 1992 WL 9212 (E.D.N.Y. 1992); United States v. One Mercedes-Benz 380 SEL VIN # WDBCA 33A1BB10331, 604 F. Supp. 1307, 1312 (S>D.N.Y. 1984) ("the vehicle itself is guilty of facilitating crime"), aff'd 762 F.2d 991 (2d Cir. 1985).

Probable cause is "judged . . . by the court." 19 U.S.C. § 1615; United States v. Sixteen Cases of Silk Ribbons, 27 F. Cas. 1099 (D.C.N.Y. 1870) (question of whether probable cause shown so as to shift burden to claimants is a question for the court); Three Thousand One Hundred and Nine Cases of Champagne, 23 F. Cas. 1168 (D.C.N.Y. 1867) (same). Hearsay is admissible to support the finding of probable cause. United States v. 4492 S. Livonia Road, Livonia, N.Y., 889 F.2d 1258, 1267 (2d Cir. 1989) (hearsay proper, since holding otherwise would undermine Congress's intentional

shifting of the burdens in forfeiture cases). As the Second Circuit has explained:

> In view of the unusual relative burdens of proof in civil forfeiture proceedings, this court, as well as a number of other circuits, has recognized an exception to the requirements of Rule 56(e) that supporting and opposing affidavits be based upon personal knowledge and admissible evidence, allowing the government to establish probable cause on the basis of hearsay affidavits.

United States v. 15 Black Ledge Drive, Marlborough, Ct., 897 F.2d 97, 101 (2d Cir. 1990). Circumstantial evidence may be relied upon to show probable cause. United States v. $2,500 in United States Currency, 689 F.2d 10, 16 (2d Cir. 1982), cert. denied sub nom. Aponte v. United States, 465 U.S. 1099 (1984).

In the instant case, first a magistrate judge and then a district judge de novo determined that the

government had probable cause to believe the funds were forfeitable. The district court's hearing on probable cause required three trial days in 1991. Post-hearing motions to reconsider the probable cause issue were denied. See United States v. All Funds et al., __ F. Supp. __, 1992 WL 37087 (E.D.N.Y. 1992).

Once the government has demonstrated probable cause, "the burden of proof shall lie upon" the claimant. 19 U.S.C. § 1615. Standing is "a threshold issue" for a claimant wishing to contest forfeiture. United States v. One 1982 Porsche 928, Three-Door, License Plate 1986/NJ Temp/534807, 732 F.Supp. 447, 451 (S.D.N.Y. 1990). If the claimant does not have standing, "the court lacks jurisdiction to consider his challenge of the forfeiture." Id. A claimant need not have actual or constructive ownership

to have standing; even a possessory interest in the property is sufficient. United States v. $37,590.00, 736 F. Supp. 1272, 1276 (S.D.N.Y. 1990).

If a claimant has standing, it bears the burden of proving by a preponderance of the evidence either 1) that the funds did not have their source in illegal drug transactions and money-laundering, or 2) that it did not know or constructively know -- through conscious avoidance of positive knowledge -- the source and nature of the funds as drug-related (the innocent owner defense). United States v. 4492 S. Livonia Road, Livonia, N.Y., 889 F.2d 1258, 1267 (2d Cir. 1989).

The innocent owner defense is set out in the statute:

> [N]o property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have

committed or omitted without [his] knowledge . . . .

21 U.S.C. § 881(a)(7). "Owner" is defined as "any person with a recognizable legal or equitable interest in the property seized." United States v. One Parcel of Real Property, 831 F.2d 566, 567 (5th Cir. 1987) (citing legislative history). Ascertaining knowledge of corporate claimants requires examining the contents of corporate books and records and the actions taken by persons acting as corporate agents.

To satisfy its burden of proof the claimant may not simply attack the finding of probable cause. United States v. 228 Acres of Land and Dwelling Located on White Hill Road in Chester, Vt., 916 F.2d 808, 812 (2d Cir. 1990), cert. denied sub nom. Moreno v. United States Drug Enforcement Admin., 111 S. Ct. 972

(1991). It has the "ultimate burden of proving that the factual predicates for forfeiture have not been met." Banco Cafetero, 797 F.2d at 1160. If the claimant cannot establish that the funds are untainted or that it is an innocent owner, the property is forfeited.

The structure of this kind of case is inherently unfair to claimants which must prove that their money is legitimate after the funds have already been seized by the government. The government needs only to show probable cause to seize. The difficulty in proving in an American court the legitimate origins of particular assets from abroad is pronounced.

Foreign enterprises conducting business in a foreign language utilizing business practices different from those known to American jurors are at a

particular disadvantage. Moreover, it is often difficult to prove a negative, as claimants must. (Yet, the jury was able to precisely differentiate those cases warranting forfeiture from those in which money was not subject to forfeiture. The diligence and determination of this American jury to be fair to foreign claimants is striking.)

A claimant that surmounts all hurdles and wins a jury verdict is entitled to receive its money promptly. In the instant case the hearing on whether the government had probable cause to seize the funds were not completed until nine months after the funds were seized. The trial was completed more than a year later. Few businesses can function without access to a substantial portion of their assets for that period of time. The claimants who met their

burden at trial of proving the legitimate source of their funds will have their money returned to them without any other compensation except interest earned, less court fees for supervision of the funds. They will have been without the use of their money for the two years since the funds were seized.

III. APPLICATION OF LAW TO FACTS

A. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Under Rule 50(b) of the Federal Rules of Civil Procedure a judge may disregard the jury's verdict only

> if the evidence, viewed in the light most favorable to the non-movants without considering credibility or weight, reasonably permits only a conclusion in the movants' favor.

Sirota v. Solitron Devices, Inc., 673 F.2d 566, 573 (2d Cir.), cert. denied, 459 U.S. 838, cert. denied sub nom. Lous

Sternbach & Co. v. Sirota, 459 U.S. 908 (1982). The court should disregard a jury determination for which "there is no legally sufficient evidentiary basis enabling a reasonable jury to make it." 1991 Adv. Committee Notes to Rule 50(b).

In the course of the two-month trial in the instant case, the jury conscientiously listened to the evidence, took notes, and was extremely careful in the course of its decision-making. The jurors were provided with notebooks with dividers to enable them to address separately each claimant and each claim in the trial. The fact that the jury decided in favor of the government on some claims and in favor of the claimants in others belies any suggestion that their deliberations were not thorough. The evidence, briefly reviewed below, supported the jury's verdict as to each

claimant and each claim.

The following claimants sought the following amounts at trial: CONFECCIONES ZUNY LTDA, $440,000; CREACIONES IVONNE LTDA, $32,000; CREACIONES KAREN LTDA, $756,625; INCOLCO LTDA, $1,000,000; MANUFACTURAS DE MODAS LTDA, $400,000; TOTE EXPORT MANUFACTURAS LTDA, $392,860; VALERY FASHIONS LTDA, $448,418; ABUCHAIBE HNOS., $200,000 and $54,070; COMERCIAL ESTRELLA LTDA, $301,500; CONFECCIONES Y TEJIDOS NACIONALES LTDA, $549,990; CREACIONES VIVIANA LTDA, $125,025, $50,030, and $50,000; INDUSTRIAS MARATHON LTDA, $805,194.49; MANUFACTURAS INTERNACIONALES LTDA, $599,970; MANUFACTURERA DEL ATLANTICO LTDA, $492,810; SIRACUSA TRADING CO. and the HEIRS OF HERIBERTO CASTRO-MESA, $3,400,000; MANUFACTURAS J.D. LTDA, $98,991; ORGANIZACION J.D. LTDA, $98,990

and $98,800; and CONFECCIONES ELIZABETH LTDA, $40,000.

The evidence of the claimants indicated -- if believed -- that massive shipments of manufactured garments were sent abroad from modern plants in Colombia to Panama in order to earn dollars legitimately. There they were handed over to ship captains who toured the Caribbean islands trading the garments for goats and local produce, losing some, having some stolen, and with the remainder disposed of through charity in Colombia and other non-traceable channels. Although possible, these and other implausible stories told by claimants' witnesses would justify the jury's skeptical view of the claimants' somewhat inconsistent positions.

The evidence of drug tainting was overwhelming. A flurry of wire transfer

activity followed the arrests of the Londono associates Jurado, Garcia, and Mahecha in Luxembourg. There was a sophisticated and complicated series of connections and financial transactions between the various drug-connected players in this case. After a description of one technique described at trial, the evidence will be more generally summarized.

1. INDUSTRIAS MARATHON LTDA

When the Londono associates were arrested in Luxembourg, authorities seized telephone books, documents, and bank records. Garcia had a business card with a bank account number written on the reverse. The same number had appeared on one of the faxes intercepted by the Luxembourg Surété Publique from Jurado's apartment in Luxembourg. The account was

at a bank in Guernsey, Channel Islands.

Investigation by the Surété revealed that Garcia earlier had arranged for $805,194.49 to be sent to the Guernsey bank from Panama by a Panamanian shell corporation nominally headed by Heriberto Castro-Mesa and Esperanza Rodriguez de Castro, Londono's parents-in-law. Funds from the account in Panama which was the source of the $805,194.49 had been used in 1987 to open other accounts in the name of Heriberto Castro-Mesa and Esperanza Rodriguez de Castro. The other funds in the Panamanian account were forfeited after the Luxembourg trial of Jurado and Garcia.

When $805,194.49 was electronically transferred to Colombian claimant Industrias Marathon via a New York bank immediately after the arrests in Luxembourg, the money was seized. The

testimony of the Analyst Holmes, the C.P.A. Kostoglian, and the former Londono associates confirmed the illicit source of the funds. The evidence was sufficient for a jury to conclude that the funds were the traceable proceeds of illegal drug money-laundering and narcotics transactions, and that claimants were aware of the drug-related sources of the funds.

2. OTHER FORFEITED CLAIMS

At the Luxembourg arrests several pocket address books were seized. Garcia's book contained the telephone numbers for representatives of the claimants, linking them with a known money-changer and drug money-launderer, Jairo Carrascal. In Colombia authorities seized a telephone book from another known drug money-launderer, Roberto Juri.

Many of the numbers in the two telephone books, seized continents apart, were identical.

Witnesses also testified that the bank accounts and records of the corporate claimants were inconsistent with the conduct of a legitimate clothing manufacturing enterprise. The evidence at trial conclusively established that the corporate records and bank statements revealed a pattern of huge same day deposits and debits reflective of drug money-laundering practices.

Special Customs Agent Steven Haywood of the United States Customs Service set up a phony bank account and entered the drug money-laundering business as a purported money-changer. Periodically he received large amounts of cash driven in cars from the New York City area, originating in cocaine sales there.

While conducting his covert money-laundering investigative operation, Haywood was instructed by a money-changer to send electronic funds transfers to corporations including claimants. Special DEA Agent Robert Michaelis testified that an account at Banco Cafetero in Panama was used by Londono and his associates to store and move narcotics proceeds. The account was identified only by a number. Money was transferred from the Banco Cafetero account to the claimants. Claimants also received electronic funds transfers from several of the identified shell corporations set up by Londono's associates.

Claimants objecting to the verdicts of forfeiture have made no showing that the evidence "reasonably permits only a conclusion in the[ir] favor." Sirota v.

Solitron Devices, Inc. 673 F.2d 566, 573 (2d Cir.), cert. denied, 459 U.S. 838, cert. denied sub nom. Louis Sternbach & Co. v. Sirota, 459 U.S. 908 (1982). The verdicts as to each claimant and each claim were supported by the evidence. The motions for judgment notwithstanding the verdict are denied.

3. MANUFACTURAS J.D. LTDA -- $98,991
ORGANIZACION J.D. LTDA -- $98,990 and $98,800

The jury at trial determined that claimants Manufacturas J.D. and Organizacion J.D had met their burden of proving that the funds were not the traceable proceeds of illegal drug activity and drug money-laundering transactions. The government apparently does not now contest the jury's conclusions. The evidence which could

reasonably have been believed by a jury supports the verdict.

4. CONFECCIONES ELIZABETH LTDA - $40,000

The jury at trial determined that even though the funds claimed by confecciones Elizabeth were the traceable proceeds of illegal drug activity and drug money-laundering transactions, claimant had met its burden of proving that it was an innocent owner. It did not "know," through its books and records or corporate representatives and agents, that the funds in question constituted the traceable proceeds of illegal drug activity and drug money-laundering transactions. The government apparently does not now contest the jury's conclusions. The evidence which could reasonably have been believed by a jury

supports the verdict.

B. MOTION FOR A NEW TRIAL

The court has the power to grant a new trial, even where the verdict was justifiable, to prevent a miscarriage of justice. Under Rule 59(a) of the Federal Rules of Civil Procedure, a court may grant a new trial if

> the jury has reached a seriously erroneous result, or . . . the verdict is a "miscarriage of justice" i.e. . . . the verdict is against the great weight of the evidence . . .

Mallis v. Bankers Trust Co., 717 F.2d 683, 691 (2d Cir. 1983). The standard is difficult to meet. The claimants have raised a number of arguments in support of their motion for a new trial. Each will be addressed in turn.

1. SHIFTING BURDEN OF PROOF

At the hearing on the post-trial motions claimants posed the question whether the shifting of the burdens of proof in forfeiture cases in constitutional. Were a constitutional violation found, a new trial or dismissal would be required. No such remedy is necessary.

The Second Circuit in United States v. Banco Cafetero Panama, 797 F.2d 1154 (2d Cir. 1986), discussed the probable cause requirements where moneys in bank accounts are at stake:

> In almost all cases, once the Government has shown probable cause to believe that someone has sold drugs and deposited the proceeds of a drug sale into a bank account, there will be probable cause to believe that the bank account contains "traceable proceeds" of the sale. . . . The burden will then be on the claimant to demonstrate that no portions of the account . . . are "traceable proceeds" of the drug sale.

Id. at 1160. The court went on to discuss the concerns about burden-shifting and the difficulty of proof:

> No doubt uncertainty caused by the fungibility of money will make it difficult and in may cases impossible for claimants to satisfy this burden. But it is precisely the function of burden of proof rules to determine which party loses where evidence is lacking or at best ambiguous. Under the Congressional scheme, the risk of uncertainty in determining the traceability of proceeds of drug sales is placed squarely on the claimant, once probable cause has been established.

Id.

The district court is bound by the Second Circuit's determination that Congress' allocation of the burdens of proof in forfeiture proceedings is constitutional. United States v. 228 Acres of Land and Dwelling Located on White Hill Road in Chester, Vt., 916 F.2d 808, 812 (2d Cir. 1990), cert. denied sub nom. Moreno v. United States Drug

Enforcement Admin., 111 S. Ct. 972 (1991). The court wrote: "we find nothing unconstitutional in congress's allocation of the burdens of proof in forfeiture cases . . . ." Id. at 814; United States v. $2,500 in United States Currency, 689 F.2d 10, 12 (2d Cir. 1982) (same), cert. denied sub nom. Aponte v. United States, 465 U.S. 1099 (1984); United States v. $250,000 in United States Currency, 808 F.2d 895, 901 (1st Cir. 1987) (shifting burdens does not violate fifth amendment); United States v. Santoro, 866 F.2d 1538, 1544 (4th Cir. 1989) ("We . . . find the burden-shifting aspect of the statute constitutional."); United States v. One 1970 Pontiac GTO, 2-Door Hardtop, 529 F.2d 65, 66 (9th Cir. 1976) (per curiam) (imposition of burden of proof on the claimant is not unconstitutional); Bramble v. Richardson,

498 F.2d 968, 970 n.2 (10th Cir.) ("[Claimant]'s conception of the forfeiture proceedings is not entirely accurate. . . . [T]he burden merely shifts to [him] once probable cause has been established."), cert. denied sub nom. Bramble v. Saxbe, 419 U.S. 1069 (1974); see also United States v. Blackwood, 47 F.2d 849, 851-52 (1st Cir.) (imposing burden of proof on the government was error where probable cause had already been found), cert. denied, 284 U.S. 627 (1931). The motion for a new trial on this ground must be denied.

2. SEPARATE TRIALS

Claimants argue that they were prejudiced by the court's refusal to grant separate trials. The claimants contend that the jury was unable to keep the evidence separated as to each

claimant and ascribed to some claimants evidence of drug tainting related solely to other claimants. Claimants move for a new trial on this ground.

The court first addressed the issue of prejudice from joinder in allocating peremptory challenges among the claimants at the outset of the trial. The jury panel was not large enough to permit each claimant to independently exercise a full set of peremptory challenges. Many potential jurors did not feel they could be fair in a drug-related case. Ultimately a jury representative of the community was selected.

Sharing of peremptory challenges was proper because the interests of the claimants were not adverse to one another. Accord Doralee Estates Inc. v. Cities Serv. Oil Co., 569 F.2d 716, 723 (2d Cir. 1977) (plaintiff allowed his

three challenges but defendant and third-party defendant required to exercise one each and three jointly); Carey v. Lykes Bros. S.S. Co., 455 F.2d 1192, 1194 (5th Cir. 1972) (district court's sharing procedure "expressly authorized by Section 1870"); Moore v. South African Marine Corp., 469 F.2d 280, 281 (5th Cir. 1972) (no error to require shared challenges even where party objects).

Separate trials were not required because the claimants' interests were not hostile. All claimants had the same burden against the government and all wanted the return of their funds. Although some evidence of the background drug money-laundering scheme overlapped, each claimant presented its own evidence to meet its own burden of proving that the funds it claimed were not the traceable proceeds of illegal drug

activity and drug money-laundering transactions. The fact that some claimants were required to prove both the legitimate source of funds and that they were innocent owners, whereas others attempted to prove only that they were innocent owners, does not change this conclusion.

Severance would have severely burdened the court and government. Accord City of New York v. Joseph L. Balkan, Inc., 656 F. Supp. 536, 549-50 (E.D.N.Y. 1987). Separate trials would have been a waste of judicial resources and would have caused extreme inconvenience to witnesses. The trial was prolonged even in its combined form because of the necessity for translation of the bulk of the testimony and the need to instruct the jury on technical financial matters. Denial of the motion

to sever in such circumstances is proper. Cf. United States v. Marietta Mfg. Co., 53 F.R.D. 390, 400 (S.D.W. Va 1971) (motion for separate trial denied to avoid protracted delay and duplication of effort). Whether to order separate trials is within the discretion of the trial court. Brown v. Advantage Eng'g, 732 F. Supp. 1163, 1170 (N.D. Ga. 1990); Keister v. Dow Chem. Co., 723 F. Supp. 117, 120 (E.D. Ark. 1989).

That the jury was not confused or claimants prejudiced is reflected in the discriminating verdicts, finding some claims valid and other invalid. The precise questions of the jurors during deliberations, their note-taking, and their calm attentiveness all belied confusion or prejudice. A joint trial was proper.

3. OMNIBUS CRIME CONTROL AND SAFE STREETS ACT

Claimants charge that the court erred in permitting the government to introduce into evidence wire transfer advises obtained in violation of the Omnibus Crime Control and Safe Street Act, 18 U.S.C § 2510 et seq. (1988 & Supp. III 1991), the federal wiretap statute. The statute prohibits the interception of "electronic communications." which includes a variety of technologies such as electronic funds transfers and electronic communications in storage.

The court has already addressed the claimants' arguments, in Manufacturas International Ltda v. Manufacturers Hanover Trust Bank, et al. (Consolidated Bank Cases), __ F. Supp. __, 1992 WL 96212 (E.D.N.Y. 1992). The complaint was

dismissed on the ground that the federal wiretap statute does not apply to the seizure of electronic funds transfers by banks following government and court instructions. See 1992 WL 96212, at *10; 1968 U.S. Code Cong. & Admin. News 2112, 2153; United States v. Herring, 933 F.2d 932, 934-35 (11th Cir. 1991) (amendments did not change statute's focus on surveillance and eavesdropping).

The wiretap statute does not apply because in forfeiture proceedings tainted property is considered forfeited at the moment the illegal act is committed. 18 U.S.C. §981(b) (1988 & Supp. III 1991); 21 U.S.C. § 881(h) (1988 & Supp. III 1991) ("relation-back" doctrine); See, e.g., United States v. One Piece of Real Property Located on Trafalgar Street in City of Aiken, S.C., 700 F. Supp. 857, 860-61 (D.S.C. 1988) (date on

government's title relates back to date of crime), aff'd sub nom. United States v. Schiferli, 895 F.2d 987 (4th Cir. 1990). As the Consolidated Bank Cases court wrote:

> The statute cannot apply where, as here, the government reasonably viewed the funds as its own. The concept that ownership of the object is transferred instantaneously at the time of criminality provides a conceptual distinction making the laws governing wiretapping and interference with communications irrelevant.

1992 WL 96212, at *10.

Finally, claimants' unsupported assertion that the introduction into evidence of the wire transfer advises violated the fourth amendment is groundless. The motion for a new trial on this ground is denied.

4. NEW YORK BANKS

Claimants contend that the court erred in not overruling the protective

order granted by the magistrate judge. The magistrate judge prohibited the claimants from taking depositions or issuing subpoenas to employees of the intermediary New York banks which seized the wire transfers. In their deposition and subpoena requests claimants sought information about the instructions given to the banks by the United States Attorneys.

In Consolidated Bank Cases, __ F. Supp. __, 1992 WL 96212 (E.D.N.Y. 1992), the court disposed of claimants' concerns about the seizure of the subject funds by the New York banks. The court dismissed the action for failure to state a claim, noting that the banks were not

> rogue banks seizing funds carelessly or without justification. The intermediary banks were following the precise oral and written instructions of the United States Attorney and the court.

Id. at *15. Since electronic funds transfers are affected rapidly, the government must be permitted to act without any interference by the banks. The banks normally should not make any independent determinations.

Where banks act as agents of the court they are protected. Id.; cf. K/S Norman Agather v. Sea Trade & Constr., Ltd., 767 F. Supp. 60, 62-63 (S.D.N.Y. 1991) (same where bank executes writ of attachment). Claimants require nothing further from the employees of the bank. The protective order was proper.

5. UNITED STATES ATTORNEYS

Claimants complain that the court granted the government's motion in limine barring claimants from calling the United States Attorneys as witnesses at trial. The court has twice addressed claimants'

desire to elicit information from the United States Attorneys.

During discovery claimants sought to depose the United States Attorneys involved in this case, but the magistrate judge granted the government's motion for a protective order. The magistrate judge determined that the taking of opposing counsel's deposition is permissible only where (1) there is no other way to obtain the information; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case. See, e.g., Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986).

The protective order was granted in part because the information could be obtained elsewhere and in part because it is undesirable for United States Attorneys to appear as witnesses at trial

to defend statements made at deposition. The magistrate judge's decision was proper. The court dismissed an action filed by claimants against the United States Attorneys who had instructed the banks to seize the funds. Abuchaibe Hnos. v. Maltz et al., CV 92-528 (oral decision).

The claimants have offered nothing to alter the conclusions reached by the magistrate judge and the district judge. There was no relevant information to be obtained from the United States Attorneys who acted ethically and responsibly in connection with the seizure of wire transfers at the New York correspondent banks.

6. EXPERT TESTIMONY

Claimants objected to the court's permitting DEA Intelligence Analyst

Holmes and Special DEA Agent Michaelis to testify and to state opinions. Agent Michaelis testified on the basis of the evidence and known drug money transfer techniques that several of the electronic wire transfers wee intended for receipt by Jose Santa Cruz Londono. There was also testimony about the existence of an overall drug money-laundering scheme. This testimony was based on the evidence at trial as well as the expertise of the witness.

Given the complex nature of the evidence, the jury was aided by this expert testimony. See Fed. R. Evid. 702, 703. Its probative force heavily outweighed any prejudice. Id. Rule 403. DEA agents may testify as experts on illegal activities such as narcotics dealing. United States v. Campino, 890 F.2d 588, 593 (2d Cir. 1989), cert.

denied, 111 S. Ct. 179, cert. denied sub nom. Estrada Ruis v.United States, 494 U.S. 1068 (1990). Sophisticated drug money-laundering activities, such as those relied upon by claimants, are a proper subject for expert testimony. The methods of moving of currency internationally and the maintaining of corporate and bank records are not subjects easily understood without some expert assistance. The jury was repeatedly admonished not to substitute the expert's opinions for the jury's own conclusions about the veracity of the testimony and the meaning of the records which constituted the bulk of the evidence.

The court has broad discretion in determining the qualifications of and need for expert witnesses. Hamling v. United States, 418 U.S. 87, 108 (1974).

Claimants have not demonstrated that the court's determination was "manifestly erroneous." Salem v. United States Lines Co., 370 U.S. 31, 35 (1962). The witnesses were properly qualified and their limited testimony useful and non-prejudicial.

7. BEST EVIDENCE RULE

Claimants' argue that the government's expert accounting witness should not have been permitted to testify as to capital investment, accounting and banking practices, and estimated profits from business enterprises. The testimony was amply supported by, and required by, the huge amount of financial documentary evidence.

Claimants argue that this testimony violates the best evidence rule. The best evidence rule refers to and governs

the admission of the contents of "a writing, recording, or photograph." See Fed. R. Evid. art X. It has no application to the testimony of an expert witness summarizing and analyzing evidence already in the record. Cf. id. Rule 1006. The objection is groundless.

C. MOTION TO RELEASE RES

Claimants Manufacturas J.D and Organizacion J.D., which sustained their burden at trial of proving that their claimed funds were not the traceable proceeds of illegal drug activity and drug money-laundering transactions, move for the immediate release of their funds. The government seeks a delay in the release of funds on the grounds that Johnny Daccarett, the owner and legal representative of claimant corporations Manufacturas J.D. and Organizacion J.D.,

is a fugitive.

The government contends that Johnny Daccarett has a prior conviction for trafficking in approximately two tons of marijuana. There is also an outstanding indictment against him in New Jersey for tax violations. It is the government's position that since Daccarett is a fugitive, the claimant corporations he represents should be barred under the disentitlement doctrine from receiving funds they rightfully claim.

The disentitlement doctrine provides that one who is a fugitive from justice cannot seek relief from the judicial system the authority of which he is flouting by fleeing prosecution. If a party is avoiding prosecution for a crime, he cannot lay claim to money or property in a related civil proceeding. See, e.g., United States v. 760 SW 1st

Street, Miami, Fla., 702 F. Supp. 575, 577 (W.D.N.C. 1989) ("[since he] fits the definition of a fugitive, . . . he may not demand to use the resources of this Court in a civil action to claim property").

1. FUGITIVE STATUS

The first question is whether Daccarett can be considered a fugitive. Claimants Manufacturas J.D. and Organizacion J.D. contend that there has been no showing that Daccarett was ever in this jurisdiction, let alone a showing that he fled to avoid prosecution.

A person can be a fugitive even when he does not "flee" but is simply found outside the jurisdiction. See Jhirad v. Ferrandina, 536 F.2d 478, 483-84 (2d Cir.) (no meaningful distinction between those leave the jurisdiction and those

who have already left and decide not to return), cert. denied, 429 U.S. 833 (1976); United States v. 218 Panther Street, Newfoundland, Pa., 745 F. Supp. 118, 121 (E.D.N.Y. 1990) ("An individual who learns of charges against him while legally outside the jurisdiction 'constructively flees' by deciding not to return."), aff'd sub nom. United States v. Eng, 951 F.2d 461 (2d Cir. 1991). To be considered a fugitive, the individual need not flee or "constructively flee" with the intent of avoiding a pending or intended prosecution. United States v. Real Property Located at Incline Village, 755 F. Supp. 308, 309 (D. Nev. 1990) ("whether [he] left before or after . . . indictment is irrelevant"; nor need there even be an official indictment handed down). Even where an individual is in prison elsewhere or it is otherwise

impossible for him to leave, he can be considered a fugitive. See, e.g., United States v. Eng, 951 F.2d 461, 464 (2d Cir. 1991) ("One may flee even though confined in prison in another jurisdiction.").

It is critical to show that the person sought in the criminal proceeding knows he is wanted by the authorities and then fails to submit to arrest. See United States v. Pole No. 3172, Hopkinton, 852 F.2d 636, 644 (1st Cir. 1988) ("Perhaps most importantly, there is no evidence that [the claimant] had notice of this proceeding . . . ."); United States v. Ballesteros-Cordova, 586 F.2d 1321, 1323-24 (9th Cir. 1978) (intent to avoid prosecution, making an individual a fugitive, can be inferred where he knows the authorities want him and he fails to surrender); United States v. Real Property Located at Incline

Village, 755 F. Supp. 308, 309 (D. Nev. 1990) (noting that individual was "aware of both the indictment and the civil forfeiture action"); United States v. Schreiber, 535 F.Supp. 1359, 1363 (S.D.N.Y. 1982) (individual who left the country in 1964 became a fugitive in 1966 when he learned he was under indictment and made no effort to return).

We assume that Daccarett was aware of the criminal charges pending against him since the government brought this fact to claimants' attention, and, through them, to their representative Daccarett. There was no legal barrier to his return to the United States. He should be, and is, treated as a fugitive.

2. "DISENTITLEMENT" DOCTRINE

An individual who is a fugitive can be barred by the disentitlement doctrine

from receiving seized funds. By extension, the government's position is that the claimant corporations which Daccarett represented should also be prevented from receiving the funds they claim. A brief explanation of the disentitlement doctrine and its development is necessary to understand the parties' positions.

The first statement of the disentitlement doctrine was in the context of a criminal proceeding, where the Supreme Court declined to adjudicate an appeal from the merits of a conviction where the appellant was a fugitive. Molinaro v. New Jersey, 396 U.S. 365, 366 (1970). Courts extended this doctrine to bar a fugitive from participating in a civil proceeding based on a prior criminal proceeding. In Conforte v. Commissioner, 692 F.2d 587, 589-90 (9th

Cir. 1982), the Ninth Circuit held that a fugitive could not contest the assessment of tax liabilities in a civil proceeding where he was a fugitive from the related criminal tax proceeding.

Finally, in 1985 the Ninth Circuit held that the disentitlement doctrine should apply in civil forfeiture proceedings. United States v. $129,374 in United States Currency, 769 F.2d 583, 587-88 (9th Cir. 1985), cert. denied sub nom. Geiger v. United States, 474 U.S. 1086 (1986). The doctrine bars not only the fugitive but also the fugitive's successor from contesting the forfeiture while at the same time resisting prosecution in a related criminal action. Id. at 587. No case has been found addressing the question now posed: whether a corporation represented by a fugitive should also be barred by the

disentitlement doctrine from claiming funds in a forfeiture proceeding.

A trial court has discretion in applying the disentitlement doctrine. United States v. Veliotis, 586 F. Supp. 1512, 1514 (S.D.N.Y. 1984) ("this matter resides within the sound discretion of the Court"). The reasons for exercising discretion in the claimants' favor are overwhelming. First, in this case no credible evidence has been submitted demonstrating that the "fugitive" controls any claimant or that he will receive the benefit of proceeds returned to a claimant. Nor is there any evidence to suggest that Daccarett is flouting the judicial system in this forfeiture case. On the contrary, the attorney for claimants Manufacturas J.D. and Organizacion J.D. asserts that Daccarett has been willing to be deposed in person

at an embassy in Colombia or by telephone but the government has refused.

Finally, the civil forfeiture is independent of the criminal case pending against Daccarett. In disentitlement cases the criminal indictment, prosecution, or potential prosecution should be related to the forfeiture proceeding. United States v. $129,374 in United States Currency, 769 F.2d 583, 588 (9th Cir. 1985) ("[the] criminal conviction and the property involved . . . are integrally related parts of the same unlawful drug dealing scheme"), cert. denied sub nom. Geiger v. United States, 474 U.S. 1086 (1986); Schuster v. United States, 765 F.2d 1047, 1049 (11th Cir. 1985) ("no question that the civil case . . . is related to the criminal case"); United States v. $45,940 in United States Currency, 739 F.2d 792, 794

(2d Cir. 1984) (question is whether his fugitive "status bars him from defending the related forfeiture proceeding") (emphasis added). In this All Funds case, the indictment at issue is in a different district and it is for tax violations. The government has not suggested that the tax violations are related to the drug money-laundering activities underlying this All Funds action.

It is the claimant corporations, Manufacturas J.D. and Organizacion J.D., which prevailed at trial -- not Johnny Daccarett. The government has shown no persuasive reason to bar the corporate claimants from receiving their funds. The jury found that the funds were not the traceable proceeds of illegal drug activity and drug money-laundering transactions. Daccarett's status as a

fugitive is irrelevant. The motion to release the res must be granted.

D. MOTION TO STAY JUDGMENT AND WAIVE SUPERSEDEAS BOND

Claimants Abuchaibe Hnos., Comercial Estrella Ltda, Confecciones y Tejidos Nacionales Ltda, Creaciones Viviana Ltda, Industrias Marathon Ltda, Manufacturas Internacionales Ltda, and Manufacturera del Atlantico Ltda move for an order staying execution of judgment pending appeal without posting a supersedeas bond.

Since the funds are in the possession of the court and gathering interest, there will be no prejudice to the government from a stay of execution of judgment. Nor is there any risk that the property will be removed:

> Unlike the typical case where the defendant ship stealthily absconds

> from port and leaves the plaintiff with no res from which to collect, here the defendant res is in the possession of the United States and thus in no danger of disappearing. . . . Having prevailed below, the government, if it wins on appeal is assured of execution regardless of whether [claimant] files a bond or stays execution of the judgment.

United States v. $95,945.18 in United States Currency, 913 F.2d 1106, 1109 (4th Cir. 1990); see also United States v. One Lot of $25,721 in Currency, 938 F.2d 1417, 1419 (1st Cir. 1991) (supersedeas bond not required).

IV. CONCLUSION

The jury's verdict of forfeiture of eighteen of the twenty-two amounts seized is fully supported by the evidence. The motions for judgment notwithstanding the verdict are denied. No errors warrant granting the motions for a new trial. The amounts claimed by Manufacturas J.D. and Organizacion J.D. are ordered

released in seven days from the date of this memorandum; the delay will permit application for a stay in the Court of Appeals. Execution of the judgment of forfeiture of funds claimed by Abuchaibe Hnos., Comercial Estrella Ltda, Confecciones y Tejidos Ltda, Creaciones Viviana Ltda, Industrias Marathon Ltda, Manufacturas Internacionales Ltda, and Manufacturera del Atlantico Ltda is stayed during the pendency of the appeal. No supersedeas bond is required.

SO ORDERED.

_____

Jack B. Weinstein
United States District Judge

Dated: Brooklyn, New York
August 5, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA -against- ALL FUNDS ON DEPOSIT IN ANY ACCOUNTS MAINTAINED AT MERRILL LYNCH, PIERCE, FENNER & SMITH, ET AL., Defendants.	FINAL JUDGMENT AND ORDER cv-90-2510

The issues in the above-captioned action were tried before a jury in the Eastern District of New York from March 9, 1992 through May 8, 1992; and

Nineteen claimants and the plaintiff UNITED STATES OF AMERICA presented witnesses and documentary evidence; and

The jury considered the issues in this action and, after due deliberation, rendered a unanimous verdict on May 8, 1992 forfeiting the following funds to plaintiff UNITED STATES OF AMERICA after deciding that the following fifteen clai

mants had failed to meet their burden of proving that the eighteen claimed amounts were not the traceable proceeds of illegal drug activity or drug money-laundering transactions or that they were innocent owners:

1. Claimant: CONFECCIONES ZUNY LTDA

   Amount: $440,000

2. Claimant: CREACIONES IVONNE LTDA

   Amount: $32,000

3. Claimant: CREACIONES KAREN LTDA

   Amount: $756,625

4. Claimant: INCOLCO LTDA

   Amount: $1,000,000

5. Claimant: MANUFACTURAS DE MODAS LTDA

   Amount: $400,000

6. Claimant: TOTE EXPORT MANUFACTURAS LTDA

   Amount: $392,860

7. Claimant: VALERY FASHIONS LTDA

   Amount: $448,418

8. Claimant: ABUCHAIBE HNOS.

Amount #1: $200,000

#2: $54,070

9. Claimant:COMERCIAL ESTRELLA LTDA

Amount: $301,500

10. Claimant: CONFECCIONES Y TEJIDOS NACIONALES LTDA

Amount: $549,990

11. Claimant:CREACIONES VIVIANA LTDA

Amount #1: $125,025

#2: $50,033

#3: $50,000

12. Claimant: INDUSTRIAS MARATHON LTDA

Amount: $805,194.49

13. Claimant: MANUFACTURAS INTERNACIONALES LTDA

Amount: $599,970

14. Claimant: MANUFACTURERA DEL ATLANTICO LTDA

Amount: $492,810

15. Claimant: SIRACUSA TRADING Co. and the HEIRS OF HERIBERTO CASTRO-MESA

Amount: $3,400,000; and

The jury rendered a unanimous verdict on May 8, 1992 returning the sum of $98,991 to claimant MANUFACTURAS J.D. LTDA after deciding that the claimant had met its burden of proving that the claimed amount was not the traceable proceeds of illegal drug activity or drug money-laundering transactions; and

The jury rendered a unanimous verdict on May 8, 1992 returning the sums of $98,990 and $98,800 to claimant ORGANIZACION J.D. LTDA after deciding that the claimant had met its burden of proving that the two claimed amounts were not the traceable proceeds of illegal drug activity or drug money-laundering transactions; and

They jury rendered a unanimous verdict on May 8, 1992 returning the sum of $40,000 to claimant CONFECCIONES ELIZA

BETH LTDA after deciding that the claimant had met its burden of proving that it was an innocent owner of the claimed amount.

ORDERED AND ADJUDGED that the sum of $10,098,495.49 plus all accrued interest from the time of deposit with the court, less fees, is hereby condemned and forfeited to the use and benefit of the UNITED STATES of AMERICA; and that the sum of $10,098,495.49 plus all accrued interest from the time of deposit with the court, less fees, be turned over to the UNITED STATES OF AMERICA in seven days and that the Clerk of the Court issue a check in the total amount payable to "United States Marshals Service" and then forward that check to United States Attorney, ATTN: Arthur P. Hui, Esq., One Pierrepont Plaza, 11th Floor, Brooklyn, NY 11201; this order is stayed pending

completion of appeals.

ORDERED AND ADJUDGED that the sum of $98,991 plus all accrued interest from the time of deposit with the court, less fees, be returned to claimant MANUFACTURAS J.D. LTDA in seven days and that the Clerk of the Court issue a check in the total amount payable to "Isidoro Rodriguez, Esq. as Attorney for Manufacturas J.D. Ltda" and then forward that check to Isidoro Rodriguez, Esq., Calle 84 No. 56-51, Piso 2, Office 4, Barranquilla, COLOMBIA.

ORDERED AND ADJUDGED that the sums of $98,990 and $98,800, plus all accrued interest from the time of deposit with the court, less fees, be returned to claimant ORGANIZACION J.D. LTDA in seven days and that the Clerk of the Court issue a check in the total amount payable to "Isidoro Rodriguez, Esq. as Attorney

for Organizacion J.D. Ltda" and then forward that check to Isidoro Rodriguez, Esq., Calle 84 No. 56-51, Piso 2, Office 4, Barranquilla, COLOMBIA.

ORDERED AND ADJUDGED that the sum of $40,000, plus all accrued interest from the time of deposit with the court, less fees, be returned to claimant CONFECCIONES ELIZABETH LTDA in seven days and that the Clerk of the Court issue a check in the total amount payable to "Davis Markel & Edwards - Trust Account" and then forward that check to M. Blair Sibley, Esq., Davis Markel & Edwards, 66 West Flagler Street, Suite 1100, Miami, Florida 33130.

ORDERED, ADJUDGED, AND DECREED that pursuant to Rules 54(b) and 58 of the Federal Rules of Procedure the Clerk of the Court enter final judgment.

SO ORDERED.

Jack B. Weinstein
United States District Judge

Dated: Brooklyn, New York
August 5, 1992

APPENDIX-D

UNITED STATES COURT OF APPEALS

For the Second Circuit

Nos. 1264, 1265---August Term 1992

(Argued: April 2, 1993
Decided: Sep. 10 1993)

Docket Nos. 92-6229, 92-6259

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

UNITED STATES OF AMERICA,

Counter-Defendant-Appellee,

- against -

JOHNNY DACCARETT; FRANCISCO J. PALACIO; CREACIONES IVONNE; SABMAR LTDA; INDUSTRIAS MARATHON LIMITADA; COMERCIAL SAMORA LTDA; EMPRESA NELSON GOMEZ, O. "FASTER"; SIRACUSA TRADING CORP.; HERIBERTO CASTRO MEZA and NELSON GOMEZ,

Claimants,

MERRILL LYNCH BANK, Certain funds contained in Account No. 044000804961700114433 held at the MERRILL LYNCH BANK 1 Columbus;PIERCE, FENNER & SMITH; MANUFACTURERS HANOVER TRUST COMPANY; SOUTHEAST BANK & BANK OF NEW YORK IN THE NAMES OF SIRACUSA TRADING

CORPORATION; HERIBERTO CASTRO-MESA; JOSE SANTACRUZ-LONDONO; JAIME VARGAS; HAROLD CASTRO; JAIRO CAMPO; ANA MILENA SANTA CRUZ;RIPON HOLDINGS; MANUFACTURAS DE MODAS; CONFECCIONES TIO; MANUFACTURAS SAMIR LTDA; MANUFACTURAS JOLIMER LTDA; BARRANQUILLA INDUSTRIAL LTDA; INDUSTRIAL MARATHON; INTERNATIONAL EXCHANGE & INVESTMENT CORP.; VALERY FASHIONS LTDA.; COMERCIALIZADORA DE SANTANDER LTDA; MANUFACTURAS DEL ATLANTICO; CONFECCIONES ELIZABETH; INDUSTRIAL DE CONFECCION LTDA.; BANCO ATLANTICO AND ALL FUNDS TRANSFERRED TO THROUGH AND OR BY MERRILL LYNCH, PIERCE FENNER SMITH, INC. BANCO ATLANTICO MANUFACTURERS HANOVER TRUST COMPANY, SOUTHEAST BANK AND BANK OF NEW YORK ON BEHALF OF OR FOR THE BENEFIT OF THE AFORESAID CLAIMANTS TO ANY ALL BANKS IN COLOMBIA AND ALL BANK ACCOUNTS THEREOF, INCLUDING BUT NOT LIMITED TO BANCO DE CALDAS ACCOUNT NUMBERS 0999306226 0331, 544-7-1844 AND 544-710-844; BANCO DEL ESTADO ACCOUNT NUMBER 8900033088; COMERCIAL COSTEÑA DE CONFECCIONES LTDA; PRODUCTO & TEXTILES COLOMBIANOS LTDA; PRODUTEXCOL LTDA; GOMEZ NELSON and COSTAFAST,

Defendants,

ABUCHAIBE HNOS.LTDA; MANUFACTURAS INTERNACIONALES LTDA; ORGANIZACION J.D. LTDA; MANUFACTURAS JD LTDA; COMERCIAL SAMORA LTDA; CREACIONES VIVIANA LTDA; COMERCIAL ESTRELLA LTDA; CONFECCIONES Y TEJIDOS NACIONALES LTDA; MANUFACTURERA DEL ATLANTICO LTDA; INDUSTRIAS MARATHON LTDA; MANUFACTURERAS DE MODA LTDA; INCOLCO LTDA; CREACIONES KAREN; TOTE EXPORT MANUFACTURAS LTDA; CREACIONES

IVONNE; CONFECCIONES ZUNY and VALERY FASHIONS,

Defendants-Appellants,

EMPRESA NELSON GOMEZ,
O. "FASTER" and COSTAFAST,

Counter-Claimants.

BEFORE:

OAKES, PIERCE, and PRATT,
Circuit Judges.

Appeal in a civil forfeiture case from a judgment of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Judge, denying motions for judgment notwithstanding the verdict and for a new trial, releasing amounts claimed by two claimants, and forfeiting the funds claimed by all other claimants.

Affirmed.

ISIDORO RODRIGUEZ, Barranquilla, Colombia S.A., for Defendants-Appellants Manufacturas Internacionales Ltda., Abuchaibe Hnos. Ltda., Comercial Samora Ltda., Creaciones Viviana Ltda., Comercial Estrella Ltda., Confecciones y Tejidos Nacionales Ltda., Manufacturera del Atlantico Ltda., Manufacturas JD Ltda., Organizacion JD Ltda., and Industrias Marathon Ltda.

MONTGOMERY BLAIR SIBLEY, Miami, FL (Davis, Markel & Edwards, of counsel), for Defendants-Appellants Confecciones Zuny Ltda., Manufacturas de Modas Ltda., Incolco Ltda., Valery Fashions Ltda., Creaciones Karen, Tote Export Manufacturas Ltda., and Creaciones Ivonne.

ARTHUR P. HUI, Assistant United States Attorney, Brooklyn, NY (Mary Jo White, United States Attorney for the Eastern District of New York, of Counsel), for Appellee.

PRATT, Circuit Judge:

INTRODUCTION

Illegal sales of controlled substances generate billions of dollars in revenue every year. Narcotics traffickers

continually seek to make their illegal income appear legitimate. When international drug conglomerates attempt to move their profits beyond the reach of law enforcement authorities, their monies are frequently funneled through financial institutions in the United States. Money laundering has become so sophisticated

> that it is not unusual to find an intricate web of domestic and foreign bank accounts, dummy corporations and other business entities through which funds are moved, almost instantaneously, by means of electronic fund transfers.

House Committee on Banking, Finance and Urban Affairs, H.R. Rep. No. 746, 99th Cong., 2d Sess. 16 (1986). The arteries of international banking systems have become the "lifeblood" of the international drug trade. See 132 Cong. Rec. S9938, S9986 (daily ed. July 31, 1986); President's Comm'n on Organized Crime,

The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering 4-8 (1984).

In an attempt to stop the flow of illicit money back to drug suppliers, congress in the past decade has passed several acts aimed at drug-trafficking and money-laundering activities. See, e.g., International Narcotics Control Act of 1992, Pub. L. No. 102-583, 106 Stat. 4914, codified at 12 U.S.C. §§ 635, 22 U.S.C. §§ 2151, 2291; Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, codified at 18 U.S.C. §§ 1956, 1957. While a money-laundering conviction results in automatic forfeiture to the government of any property involved in the offense, see 18 U.S.C. § 982(a), the government can also institute civil forfeiture proceedings without first obtaining a conviction. See 18

U.S.C. §981. This case tests the effectiveness of civil forfeiture as a tool for seizing and forfeiting proceeds of narcotics trafficking as they pass through our banking system.

FACTS AND BACKGROUND

There are two groups of claimants: the "Atlantico Claimants", consisting of Manufacturas Internacionales Ltda., Abuchaibe Hnos. Ltda., Comercial Samora Ltda., Creaciones Viviana Ltda., Comercial Estrella Ltda., Confecciones y Tejidos Nacionales Ltda., Manufacturera del Atlantico Ltda., Manufacturas JD Ltda., Organizacion JD Ltda., and Industrias Marathon Ltda.; and the "Barranquilla Claimants", consisting of Confecciones Zuny Ltda., Manufacturas de Modas Ltda., Incolco Ltda., Valery Fashions Ltda., Creaciones Karen, Ltda., Tote Export

Manufacturas Ltda., and Creaciones Ivonne Ltda. Both sets of claimants appeal from a final judgement and other rulings of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Judge, following a jury verdict that forfeited to the government more than $10,000,000, pursuant to 18 U.S.C. § 981 and 21 U.S.C. § 881. United States v. All Funds on Deposit in Any Accounts Maintained at Merrill, Lynch, Pierce, Fenner & Smith, 801 F. Supp. 984 (E.D.N.Y. 1992) (All Funds) (technical amendment to opinion filed on Sept. 14, 1992).

The forfeitures arose out of an international effort to impede the drug-trafficking and money-laundering activities of the Cali cartel, a Colombian conglomerate headed by Jose Santacruz-Londoño, which allegedly imports appr-

oximately 3000 kilograms of cocaine a month into the United States. The cartel uses bank accounts throughout the United States, Europe, and Central and South America to store and move its narcotics proceeds. Its funds are moved through various international banks by means of electronic funds transfers (EFTs) for ultimate deposit into Colombian bank accounts.

When a customer wants to commence an EFT, its bank sends a message to the transfer system's central computer, indi cating the amount of money to be transferred, the sending bank, the receiving bank, and the intended beneficiary. The Central Computer then adjusts the account balances of the sending and receiving banks and generates a printout of a debit ticket at the sending bank and a credit ticket at the receiving bank. After the

receiving bank gets the credit ticket, it notifies the beneficiary of the transfer. If the originating bank and the destination bank belong to the same wire transfer system, then they are the only sending and receiving banks, and the transfer can be completed in one transaction. However, ff the originating bank and the destination bank are not members of the same wire transfer system, which is often the case with international transfers, it is necessary to transfer the funds by a series of transactions through one or more intermediary banks.

The seizures at issue were precipitated by the arrests of three Santacruz-Londoño associates in Luxembourg on June 28 and 29, 1990. These men had opened hundreds of bank accounts throughout Europe and deposited large sums of money in them for the Cali cartel. Anticipat

ing that these arrests would trigger an effort by the cartel to move its monies to Colombia before they could be confiscated, Luxembourg law-enforcement authorities requested the assistance of several countries to freeze monies related to the cartel. During July and August 1990, a flurry of electronic funds transfers from the suspect accounts ensued, resulting in the seizure of $ 30 million in Europe, $ 16 million in Panama, and $ 12 million in the United States.

The $ 12 million seized in the Unit ed States was the aggregate of dozens of EFTs sent through New York City intermediary banks that had correspondent banking relationships with Panamanian and Colombian banks, including Banco Atlantico, Manufacturers Hanover, The Bank of New York, and Merrill Lynch. After receiving the subject EFTs, the intermedi

ary banks were supposed to credit the accounts of designated correspondent Colombian banks; the Colombian banks were then supposed to notify the beneficiaries that the funds were available. However, through both oral orders and a series of eight arrest warrants in rem, government agents instructed the intermediary banks in New York to attach "all funds" on deposit in the names of various individu als and entities connected with Santa-cruz-Londoño and "all related entities and individuals", and to inform the agents about all transfers that were destined for a third-party beneficiary in Colombia. The intermediary banks complied with the agents' directions; they initially froze the seized funds and later transferred them to the clerk of the court who now holds them pending the outcome of this appeal.

Each successive warrant included more names. If the government agents seized funds destined for a corporation not yet named in the complaint, it would amend the complaint to add that corporation's name soon after the seizure. By the seventh amended complaint and its accompanying warrant, all but one of the claimants in this action were explicitly named. The Drug Enforcement Agency ("DEA") also subpoenaed from the interme diary banks financial records of any accounts related to the entities named in the complaint.

The ten Atlantico Claimants and seven Barranquilla Claimants (collective ly "claimants"), purportedly Colombian clothing export companies, were the intended beneficiaries of the seized EFTs. They filed claims to approximately $ 6.5 million of the seized funds, denied all

of the allegations in the in rem complaint, and claimed that their monies had been derived from legitimate sales of clothing. The Atlantico Claimants also brought two counterclaims, seeking damag es for alleged violations of the fourth and fifth amendments, of the Electronic Communications Privacy Act, see 18 U.S.C. §§ 2510-2520 and §§ 2701-2710, of the Right to Financial Privacy Act, see 12 U.S.C. §§ 3401-3422, of the Federal Tort Claims Act, see 28 U.S.C. §§ 2671-2680, and of the civil forfeiture statutes, see 21 U.S.C. § 881; 18 U.S.C. § 981. Their counterclaims were dismissed before trial.

In a related action, claimants sued the intermediary banks in the United States District Court for the Eastern District of New York, Jack B. Weinstein, Judge, for loss of the use of their funds

and violation of various federal and state statutes. Judge Weinstein granted summary judgment for the banks, holding that they could not be held liable for following government orders respecting claimed government funds. Manufacturas International, Ltda v. Manufacturers Hanover Trust Co., 792 F.Supp. 180, 196 (E.D.N.Y. 1992) (Consolidated Bank Cases).

In still another related action, claimants sued the United States attorneys who had ordered the banks to seize the funds; Judge Weinstein dismissed that suit for failure to state a claim. Abuchaibe Hnos. v. Maltz, No. 92 Civ. 528 (E.D.N.Y. Mar. 11, 1992) (oral decision).

On May 13, 1991, after an ex parte, in camera hearing, Magistrate Judge A. Simon Chrein found that the government had shown in this civil forfeiture pro

ceeding probable cause "to believe that the defendant funds constitute the proceeds of narcotics trafficking and/or money laundering" under 21 U.S.C. §881(i) and 18 U.S.C. § 981(g). Two weeks later, Judge Weinstein held a three-day evidentiary hearing in which he also determined that there was probable cause to believe the funds were forfeitable. Claimants' motion to vacate the probable-cause finding and to suppress evidence obtained by the DEA subpoenas were denied on February 19, 1992.

On March 9, 1992, a two-month jury trial began. The government presented extensive evidence, including corporate and banking records from all over the world and the testimony of witnesses familiar with the Cali cartel's operations. That evidence linked Santacruz-Londono's drug proceeds to various Pana

manian and Colombian shell corporations. The claimants tried to show that the monies were the legitimate profits from sales of clothing made in Colombia and Panama. They claimed that massive shipments of clothing were handed over to ship captains who toured the Caribbean islands, trading some for produce, livestock, and currency, losing some in tran sit, having some stolen, and finally disposing of the remainder of the shipments through charitable means. All Funds, 801 F. Supp. at 992.

The jury found that eighteen of the twenty-two amounts seized were forfeitable. For the remaining amounts, the jury found that those claimed by Manufac turas J.D. Ltda. and Organizacion J.D. Ltda. were not traceable proceeds of illegal money-laundering and narcotics transactions, and that Confecciones Eliz

abeth Ltda. was an innocent owner. After the trial, those claimants who received an adverse jury decision moved for judgment notwithstanding the verdict and for a new trial; both motions were denied. Judge Weinstein ordered the release of the amounts found not to be forfeitable and stayed execution of the forfeitures pending this appeal. Most of the claimants have appealed. However, Siracusa Trading Company, a claimant whose funds were seized from Merrill Lynch's office in Columbus, Ohio, and Confecciones Eliz abeth Ltda. the claimant found to be an innocent owner, did not appeal.

Comercial Samora, one of the Atlantico Claimants, has also appealed, although it did not participate in the civil forfeiture trial. On the first day of the trial, Comercial Samora withdrew its verified claim and all other papers

that it had filed in the proceedings. Judge Weinstein consequently entered a separate judgment of forfeiture on June 5, 1992, against the $124,000 originally claimed by Comercial Samora; in his August 5, 1992, opinion, Comercial Samora is noticeably absent from the list of claimants at trial. All Funds, 801 F. Supp. at 992. Nevertheless, Comercial Samora has appealed with the rest of the Atlantico Claimants from the August 5, 1992, judgment; it did not file a separate brief on appeal, and no separate arguments were made on its behalf.

The claimants, including the two whose funds were found not to be the proceeds of illegal drug trafficking, raise numerous issues on appeal, challenging the validity of the seizures and pleadings, various aspects of the trial, dismissal of the counterclaims, and the

district court's allowance of the execution of an IRS levy. For the reasons stated below, we affirm.

DISCUSSION

The conceptual underpinnings of civil forfeiture can be traced back to ancient Roman and medieval English law, both of which made objects used to violate the law subject to forfeiture to the sovereign. See United States v. 785 St. Nicholas Ave., 983 F. 2d 396, 401-02 (2d Cir.) (St. Nicholas Ave.) (discussing historical origins of forfeiture), cert. denied, 61 U.S.L.W. 3772 (1993). Our laws providing for official seizure of property used in criminal activity perpetuate the legal fiction that "property used in violation of law was itself the wrongdoer that must be held to account for the harms it had caused." United

States v. 92 Buena Vista Avenue, 113 S. Ct. 1126, 1135 (1993) (Buena Vista Ave.). Because the property, or res, is considered the wrongdoer, it is regarded as the actual party to in rem forfeiture proceedings. Id.

Civil forfeiture has recently gained new life as an instrument of federal law enforcement, particularly as a weapon in the "war on drugs". As part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, congress strengthened civil forfeiture as a means of confiscating illegal substances and the means by which they are manufactured and distributed. Pub. L. No 91-513, 84 Stat. 1276 (1970), codified at 21 U.S.C. §§ 881-896. In 1978 congress amended the act to authorize the seizure and forfeiture of the proceeds of illegal drug transactions as well. The statute pro

vides for the forfeiture of "[a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance [as well as] all proceeds traceable to such an exchange." Pub. L. No. 95-633, 92 Stat. 3777 (1978), codified at 21 U.S.C. § 881(a) (6) (emphasis added).

Now "one of the most potent weapons in the judicial armamentarium", see United States v. 384-390 West Broadway, 964 F. 2d 1244, 1248 (1st Cir. 1992) (West Broadway) (discussing widespread use of in rem proceedings against drug offenders, civil forfeiture has become a favored method for imposing significant economic sanctions against narcotics traffickers. However, the ease with which the government can seize property and the potential hardships caused to

innocent owners who seek to recover their property once the government has seized it have elicited concern from courts and commentators alike. Given that the reach of civil forfeiture is constantly expand ing to new realms -- in this case, to electronic funds transfers between banks -- the courts must ensure that constitutional and procedural safeguards remain intact.

A. Seizures.

There are three ways the government can institute civil forfeiture in rem proceedings under 21 U.S.C. § 881. First, it can follow the process set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims ("Sup plemental Rules"). 21 U.S.C. § 881(b). Second, it can obtain a seizure warrant in the manner provided for in the Federal Rules of Criminal Procedure, which re

quires a finding of probable cause ex parte by a judicial officer. Fed. R. Crim. P. 41(c). Third, it can seize property without judicial process "when the Attorney General has probable cause to believe the property is subject to civil forfeiture." 21 U.S.C. § 881(b)(4). See St. Nicholas Ave., 983 F. 2d at 402 (discussing three options); United States v. 4492 S. Livonia Rd., 889 F 2d 1258, 1262-63 (2d Cir. 1989) (Livonia Rd.) (same). In this case, the government used the first and third options, neither of which requires pre-seizure judicial approval. See United States v. Four Parcels of Real Property in Greene and Tuscaloosa Counties, 941 F. 2d 1428, 1432 n.5 (11th Cir. 1991).

Before analyzing the validity of the seizures here, we note that even when the initial seizure is found to be illegal,

the seized property can still be forfeited. See United States v. $37,780 in United States Currency, 920 F.2d 159, 163 (2d Cir. 1990) (holding that "illegal seizure of property does not immunize that property from forfeiture"). This is because seizure and forfeiture are two distinct events. While both require the government to have probable cause, the consequences of lack of probable cause may differ depending on the event. Absence of probable cause at the time of the seizure may result in the suppression of evidence in later proceedings, but the defendant property itself cannot be suppressed from the forfeiture action. See id. In contrast, a failure to establish probable cause on the forfeiture issue will preclude forfeiture of the property altogether. See discussion Part B, infra.

1. Compliance with Supplemental Rules.

The seizures of at least nine of the EFTs followed the process prescribed by the Supplemental Rules. Under the Supplemental Rules, the government begins by filing a verified complaint in the district where the seizure (arrest of the property) will occur. Supp. Rule C(2). Ordinarily, the court must review the papers authorizing an arrest warrant in rem. See Supp. Rule C(3). However, in actions for "forfeitures for federal statutory violations", as in this case, "the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for the arrest of the * * * property without requiring a certification of exigent circumstances." Id. (emphasis added).

Claimants argue that the in rem

complaints failed to comply with the particularity requirements for pleadings set forth in the Supplemental Rules. Two rules address the level of particularity required in forfeiture complaints. Rule C(2) states that the complaint "shall describe with reasonable particularity the property that is the subject of the action." Rule E(2)(a) specifies that the complaint must "state the circumstances from which the claim arises with such particularity that the defendant or clai mant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading."

These standards are more stringent than the general pleading requirements set forth in the federal rules of civil procedure, see Livonia Rd., 889 F.2d at 1266, and implicit accommodation to the

drastic nature of the civil forfeiture remedy. West Broadway, 964 F.2d at 1248; see also 12 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 3242 (1973). The particularity-of-pleading requirements in forfeiture cases provide a "way of ensuring that the government does not seize and hold, for a substantial period of time, property to which, in reality, it has no legitimate claim." Livonia Rd., 889 F.2d at 1266 (quoting United States v. Pole No. 3172, Hopkinton, 852 F.2d 636, 638 (1st Cir. 1988)).

The complaint does not have to meet the ultimate trial burden of showing probable cause for forfeiture; it simply needs to establish a "reasonable belief that the government can show probable cause for forfeiture at trial." United States v. U.S. Currency, in the Amount

of $150,660.00, 980 F.2d 1200, 1204-05 (8th Cir.1992). In other words, the complaint need not allege facts sufficient to show that specific property is tainted, but facts sufficient to support a reasonable belief that the government can demonstrate probable cause for finding the property tainted. Id. at 1205; see also United States v. One Parcel of Real Property, 921 F.2d 370, 376 (1st Cir. 1990); Pole No. 3172, Hopkinton, 852 F.2d at 640.

Claimants contend that the in rem complaints did not contain a particular description of the funds to be seized or sufficient allegations to link the funds to illegal drug activity. More specifically, they argue that the use of the phrase "all related entities and individ uals" in the complaint unduly broadened the scope of the warrant and impermissi

bly gave the government "full discretion" to seize whatever property it desired.

Whether a forfeiture complaint is sufficiently particularized to reach a given piece of property is an issue of law subject to plenary review. West Broadway, 964 F.2d at 1248; U.S. Currency, in the Amount of $150,660.00, 980 F.2d at 1204. In determining whether a complaint satisfies rule E(2) (a), a court may also consider supporting affidavits that may cure a lack of particularity in the complaint itself. Livonia Rd., 889 F.2d at 1266.

If the complaint had described the subject properties as simply "all funds on deposit in any accounts maintained * * * in the name [] of * * * Jose Santacruz-Londoño" and "all related entities and individuals", without more, then the claimants' argument might be well

taken. However, given that the names of the claimants were gradually added by the successive amendments to the complaint, we will discuss in this section here only those seizures that were preceded by a complaint and arrest warrant that explic itly named the intended beneficiary. All other seizures, that is, those made before the complaint and arrest warrant specifically mentioned the EFT's intended beneficiary, will be treated as warrantless seizures, which are discussed in the next section. This approach will obviate any dependence on the "related parties" language in the warrant.

The successive complaints name as defendants "all funds on deposit" in certain banks "in the names of "various named claimants, "including, but not limited to" specific account numbers. The complaints allege that Santacruz-

Londoño "caused substantial sums of monies" from narcotics trafficking and money laundering to be transferred through accounts, "including the defendant accounts", and credited to accounts, including those of various named claimants. In addition, an international Letter Rogatory from the Eastern District of New York is incorporated by reference and attached to the complaint. It describes in greater detail the government's investigation since 1979 of Santacruz-Londoño, the arrests of the three cartel members in Luxembourg, and the use of Colombian shell corporations for disguising the illegal nature of the narcotics proceeds.

By naming both the intermediary banks through which the funds were to be transferred and the intended beneficiaries of the EFTs, the complaint described the subject property with "reasonable

particularity". See Supp. Rule C(2). By recounting Santacruz-Londoño's activities and methods of funneling his narcotics proceeds through various New York banks for ultimate deposit in Colombian bank accounts, the complaint states "the circumstances from which the claim arises" with sufficient particularity for the claimants to "commence an investigation of the facts and frame a responsive pleading". See Supp. Rule E(2).

In this case, the claimants filed verified claims and responsive pleadings to the Seventh Amended Complaint in rem without moving for a more definite statement. We conclude that the complaints and their accompanying warrants of arrest complied with the pleading requirements of the Supplemental Rules.

2. Seizure without Judicial Process.

At least eleven of the amounts were seized either without a warrant or prior to the issuance of a warrant that explic itly named the intended beneficiary of the EFT. We will analyze all such seizures as warrantless seizures. When the "Attorney General has probable cause to believe" that property is subject to forfeiture under § 881, the government is authorized to seize the property without judicial process. 21 U.S.C. § 881 (b)(4).

Therefore, the question is whether the assistant United States attorneys, as representatives of the Attorney General, had "probable cause to believe" that the EFTs were "subject to civil forfeiture under [§ 881]" at the time they requested the intermediary banks to attach the

subject EFTs. Clearly they did. This is not a case in which the government "stumbled" into a seizure without any prior information about the subject property. See, e.g., $37,780 in United States Currency, 920 F.2d at 163 (holding that DEA agents at airport lacked probable cause to seize money from claimant's attaché case at time of seizure). Instead, they knew that Santacruz-Londoño, who had already been indicted in this country for various narcotics and money-laundering violations, would probably be directing the transfer of illicit income through particular New York banks to the accounts of several of his "businesses" in Colombia.

There are two additional statutory requirements for seizures without judicial process. First, after seizure the government must institute forfeiture

proceedings "promptly". 21 U.S.C. § 881 (b). Second, the proceedings should follow applicable customs laws, 21 U.S.C. § 881 (d), which are found at 19 U.S.C. §§ 1595a to 1615. In this case, the government satisfied both requirements. It filed a civil forfeiture complaint within days of each warrantless seizure, and the resulting forfeiture proceeding followed the applicable customs laws.

3. Fourth-Amendment Concerns.

Claimants argue that their fourth-amendment rights were violated in three instances: (1) when EFTs were seized without a warrant; (2) when EFTs were seized pursuant to a rule C(3) warrant without a prior judicial determination of probable cause; and (3) when the government gained access to their financial records from the intermediary banks with out a warrant.

The Fourth amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and provides that "no Warrants shall issue, but upon probable cause, * * * and particularly describing the place to be searched[] and the * * * things to be seized." U.S. Const. amend. IV.

a. The Warrant Requirement.

We first address the fourth amendment's applicability to warrantless seizures made pursuant to 21 U.S.C. § 881 (b)(4). While some circuits have held that the fourth amendment's warrant requirement is inapplicable in light of the statute's plain language allowing seizure without judicial process, see, e.g., United States v. One 1977 Lincoln Mark V Coupe, 643 F.2d 154, 158 (3d Cir.) (only

need probable cause, not a warrant, because property subject to forfeiture is contraband), cert. denied, 454 U.S. 818 (1981); United States v. One 1978 Mercedes Benz, 711 F.2d 1297, 1302 (5th Cir. 1983) (warrantless seizure of automobile pursuant to § 881 (b)(4) does not offend fourth amendment); United States v. Valdes, 876 F.2d 1554, 1557 (11th Cir. 1989) (warrantless seizure of automobiles used to facilitate drug transaction did not violate fourth amendment), this circuit requires seizures made pursuant to § 881 (b)(4) to comport with the fourth amendment, see, e.g., United States v. LaSanta, 978 F.2d 1300, 1304-05 (2nd. Cir. 1992) (warrantless seizure of vehicle must meet a recognized exception to fourth amendment); cf. In re Application for Warrant to Seize One 1988 Chevrolet Monte Carlo, 861 F.2d 307, 311 (1st Cir.

1988) (fourth amendment applies to forfeiture seizures); United States v. Linn, 880 F.2d 209, 215 (9th Cir. 1989) (same).

Therefore, to be valid the warrantless seizures must fall within one of the recognized exceptions to the fourth amendment's warrant requirement. LaSanta, 978 F.2d at 1305. The government argues that the exigent-circumstances exception justifies any warrantless seizures made in this case. They claim that EFTs can be "completed in a matter of minutes or hours", and therefore present "greater exigencies than the seizure of a conveyance[] or perhaps[] any other kind of property". Because the property at issue was fungible and capable of rapid motion due to modern technology, we are satisfied that exigent circumstances were present here. The seizures made pursuant to § 881 (b)(4), therefore, did not vio

late the fourth amendment.

b. The Probable-Cause Requirement.

With respect to the EFT seizures that were made pursuant to an in rem warrant, claimants argue that because the warrants were issued "forthwith" by a "clerk of the court", without a preceding probable-cause determination, see Supp. Rule C(3), they failed to satisfy the fourth amendment's probable-cause requirement. Several courts have held the Supplemental Rules' summary-warrant procedures unconstitutional. See, e.g., United States v. Life Ins. Co., 647 F. Supp.732, 742 (W.D.N.C. 1986) ("without a determination of probable cause by a qualified judicial officer, [§] 881(b) violates the Warrants clause of the Fourth Amendment"); United States v.

$128,035 in U.S. Currency, 628 F. Supp. 668, 672-73 (S.D. Ohio) ("procedure authorized by § 881(b) runs afoul of minimal Fourth Amendment procedural requirements"), appeal dismissed, 806 F.2d 262 (6th Cir. 1986). Other courts have held that in rem warrants are not true "warrants" subject to fourth-amendment stric tures. See, e.g., United States v. TWP 17 R 4, 970 F.2d 984, 987-89 (1st. Cir. 1992) (posting an in rem warrant on prop erty not a seizure for purposes of fourth amendment); United States v. Turner, 933 F.2d 240, 245 (4th Cir. 1991) (in rem warrant more analogous to a summons, not a "warrant" within the meaning of fourth amendment).

In this circuit, just as warrantless seizures under § 881 (b)(4) must satisfy the fourth amendment, so must seizures made with warrants pursuant to the Sup

plemental Rules. Therefore, although the plain language of § 881(b) allows for the issuance of a warrant without probable cause, see, e.g., One 1978 Mercedes Benz, 711 F.2d at 1302 ("If [Attorney General] lacks probable cause * * * he may file a verified complaint pursuant to the maritime rules and effect the seizure pursuant to that process"), the fourth amendment mandates the existence of probable cause at the time of seizure. $37,780 in U.S. Currency, 920 F.2d at 163 (fourth amendment requires government to have probable cause at the time it seizes money). However, the government need not obtain a judicial determination of proba ble cause prior to seizure. While "absent an `extraordinary situation' a party cannot invoke the power of the state to seize a person's property without a prior judicial determination that the seizure

is justified", the Supreme Court has held that "such an extraordinary situation exists when the government seizes items subject to forfeiture." United States v. Eight Thousand Eight Hundred & Fifty Dollars, 461 U.S. 555, 562 n.12 (1983) (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 633 (1974)).

Therefore, the government must have probable cause at the time the clerk issues the warrant in rem, but need not demonstrate that it had probable cause at the time of the seizure unless a claimant challenges the validity of the seizure. As discussed in section 2 above, the government had probable cause to believe that the defendant funds were the proceeds of illegal narcotics trafficking at the time they were seized.

c. Privacy Interests in Financial Records.

Finally, claimants argue that the DEA's subpoenas of all the financial records at the intermediary banks relating to the EFTs violated their fourth-amendment rights. The government contends that the claimants do not have any protectable fourth-amendment interest in the bank records at issue, because they are not customers of the intermediary banks. We agree. Claimants hold accounts with Colombian banks, which have accounts with the intermediary banks. The claimants' relationship with the intermediary banks is too remote to afford the claimants any legitimate expectation of privacy in information about EFTs being received by the intermediary banks.

Even if claimants had their own

accounts with the intermediary banks, information regarding those accounts would not be protected by the fourth amendment. In United States v. Miller, 425 U.S. 435 (1976), the Supreme Court held that a bank customer had no "protected Fourth Amendment interest" in the copies of checks and other records the bank retained. Id. at 440. The Court stated that the fourth amendment "`at the most guards against * * * too much indef initeness or breadth in the things required to be "particularly described," if * * * the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant.'" Id. at 445-46 (quoting Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 208 (1946)).

The Court reinforced Miller in S.E.C. v. Jerry T. O'Brien, Inc., 467

U.S. 735 (1984), where the Securities and Exchange commission had subpoenaed an individual's financial records from two broker-dealer firms. The court held that the individual had no fourth-amendment claim, because once he gave his financial information to someone else, "even on the understanding that the communication [wa]s confidential," he could not object if the third party conveyed that informa tion to law-enforcement authorities. Jerry T. O'Brien, Inc., 467 U.S. at 743 (citing Miller, 425 U.S. at 443). The Court also noted that a "target" of an investigation has no right to notice of subpoenas issued to third parties. Id. at 742-43.

Because the DEA was authorized to demand information regarding the EFTs from the intermediary banks and the mate rials requested were relevant to their

investigation, we conclude that no fourth-amendment violation occurred here.

4. Right to Financial Privacy Act.

The Right to Financial Privacy Act ("RFPA") prohibits "financial institutions" from giving the government access to "the information contained in the financial records of any customer" absent a search warrant, subpoena, court order, formal written request, or customer authorization. 12 U.S.C. § 3402. Congress enacted the RFPA in part as a response to Miller, 425 U.S. 435. See H.R. Rep. No. 1383, 95th Cong., 2d Sess. 34 (1978), reprinted in 1978 U.S.C.C.A.N. 9273, 9306; see also United States v. Mann, 829 F.2d 849, 851 (9th Cir. 1987); Duncan v. Belcher, 813 F.2d 1335, 1337 (4th Cir. 1987). However, the "most salient feature of the Act is the narrow scope of the entitlements it creates", because

congress wanted to "minimize[] the risk that customers' objections to subpoenas will delay or frustrate agency investigations." Jerry T. O'Brien, Inc., 467 U.S. at 745-46.

If the government gains access to financial records through a warrant, subpoena, court order, or written request, it must give the financial institution's "customer" simultaneous notice of the access. see 12 U.S.C. § 3405(2) (administrative subpoena and summons); 12 U.S.C. § 3406(b) (search warrant); 12 U.S.C. § 3407(2) (Judicial subpoena); 12 U.S.C. § 3408(4)(A) (formal written request). In this case, however, the DEA's subpoenas "for all financial records" of "any and all accounts related to" the claimants explicitly instructed the intermediary banks not to disclose the existence of their requests.

The Barranquilla Claimants contend that since they were not given notice of the government's access to the financial records, the evidence obtained from the subpoenas should have been suppressed at trial. The Atlantico Claimants argue that Judge Weinstein improperly dismissed their counterclaim alleging that the government and the intermediary banks were liable under the RFPA for disclosing information about the EFTs.

In response to both arguments, the government maintains that the claimants are not protected by the RFPA, because they are not "customers" of the intermediary banks. Under the RFPA, a "customer" is "any person or authorized representative of that person who utilized or is utilizing any service of a financial institution * * * in relation to an account maintained in the person's name."

12 U.S.C. § 3401(5) (emphasis added). A "person" is defined as "an individual or a partnership of five or fewer individuals." 12 U.S.C. § 3401(4). Thus, the act is limited to individual customers and small partnerships; corporations are not protected. see, e.g., Pittsburgh National Bank v. United States, 771 F.2d 73 (3d Cir. 1985); Spa Flying Service, Inc. v. United States, 724 F.2d 95 (8th Cir. 1984) (per curiam); see also Jerry T. O'Brien, Inc., 467 U.S. at 745 (RFPA "carefully limits the kinds of customers to whom it applies").

The government notes that the claimants are all corporations and therefore are not protected by the RFPA. It is unclear from the record on appeal whether the claimants are partnerships or corporations. If they are corporations, as they alleged in the district court, then

they are not protected by the RFPA. If they are partnerships, as they now claim on appeal, we would need to remand so that the district court could obtain proof to that effect; however, a remand is not necessary, because there are alternate grounds that preclude the application of the RFPA.

Even if the claimants are in fact small partnerships rather than corporations, the government contends that they still would not be protected by the RFPA, because they do not hold accounts in their names at the banks as required by 12 U.S.C. § 3401(5). The funds were not seized from accounts held in the various claimants' names, but were the proceeds of wire transfers that were designated to be credited to the accounts of Colombian banks maintained at the intermediary banks.

In response, claimants argue that once the EFTs were intercepted by the intermediary banks, the frozen funds were held by those banks under the claimants' names. At that point, claimants contend, they had "accounts" in their names at the banks. While claimants present a creative interpretation of an "account", the seized funds were being held by the banks until the forfeiture trial at the request of the government, not the claimants. The RFPA is meant to protect those who maintain accounts in their names at financial institutions. Duncan, 813 F.2d at 1338 (definition of customer turns on "whether the individual maintains the financial account in his or her name only"); Ridgeley v. Merchants State Bank, 699 F. Supp. 100, 102 (N.D. Tex, 1988). Because the funds were being held in custody at the banks pursuant to an ar

rest warrant, we conclude that the claim ants never maintained accounts in their names at the intermediary banks.

Finally, the government contends that even if there had been a statutory violation of the RFPA, exclusion of the financial records from trial would not have been a permissible remedy. Because the RFPA states that civil penalties are "the only authorized" remedy for its violation, see 12 U.S.C. § 3417(d), it would be inappropriate for the courts to imply a suppression remedy as well. United States v. Frazin, 780 F.2d 1461, 1466 (9th Cir.) (only remedy under RFPA is provided in statute), cert. denied, 479 U.S. 844 (1986); see also United States v. Thompson, 936 F.2d 1249, 1252 (11th Cir. 1991) (courts should not imply a suppression remedy unless statute specifically refers to exclusionary rule),

cert. denied, 112 S. Ct. 975 (1992).

In short on this point, because the RFPA does not protect the claimants, the Atlantico Claimants' counterclaim was properly dismissed, and the financial records were properly admitted at trial.

5.Authorization for DEA Subpoenas.

The Barranquilla Claimants also claim that the financial records should have been suppressed at trial because the DEA did not follow proper administrative procedures for issuing the subpoenas. Specifically, they argue that John Maltz, whose rubberstamped signature is on the subpoenas, did not have the authority to issue the subpoenas, and that even if he did, he failed to personally determine whether the subpoenas were "relevant or material" to investigations conducted under the Comprehensive Drug Abuse Prevention and Control Act of 1970, as re

quired by 21 U.S.C. § 876 (a). See United States v. Hossbach, 518 F. Supp. 759, 765-66 (E.D. Pa. 1980).

Section 876 (a) authorizes the Attorney General to issue subpoenas for "relevant or material" information; the Attorney General may in turn delegate this subpoenas power to any DEA officer or employee. See 21 U.S.C. § 878(a)(2); see also United States v. Mountain States Tel. & Tel. Co., 516 F. Supp. 225, 229 n.2 (D. Wyo. 1981). The relevant federal regulation authorizes, among others, all Special Agents-in-Charge and Assistant Special Agents-in-Charge to issue subpoenas. 28 C.F.R. § 0.104, App. to Subpart R, Sec. 4(a).

Maltz was the Associate Special Agent-in-Charge of the New York Drug Enforcement Task Force, a position not specifically included in the regulation's

list. The Barranquilla claimants argue that any subpoena issued by Maltz was therefore unauthorized. As an Associate Special Agent-in-Charge, however, Maltz supervises nine Assistant Special Agents in-Charge, agents who are specifically authorized to issue subpoenas under the regulation. During Maltz's eight years as an Associate Special Agent-in-Charge, internal New York Drug Enforcement Task Force procedures have required all admin istrative subpoenas to bear his signature. Since Maltz has the same authority as an Assistant Special Agent-in-Charge, plus additional supervisory responsibili ties, we agree with Judge Weinstein that Maltz's exercise of the subpoenas power was proper. See Hossbach, 518 F. Supp. at 765-66 (upholding validity of subpoenas issued by either agents-in-charge or acting agents-in-charge).

The Barranquilla Claimants further argue that Maltz never "issued" the subpoenas because they simply bear his rubber-stamped signature; nor is there any indication that Maltz personally determined that the information sought was "relevant or material" to an investigation. Judge Weinstein called the DEA's procedures in this respect "dangerous" and recommended that the government review its system for issuing DEA administrative subpoenas, but he denied the claimants' motion to suppress. We find no error in his ruling. Nothing in the statute, regulations, or caselaw requires a handwritten, rather than a rubber-stamped, signature on the subpoena. More significantly, even if the initial subpoenas were defective, the financial records at issue would have been introduced at trial anyway, because they were pro

cured through other means as well. Both the government and the claimants served the intermediary banks with deposition and trial subpoenas for the same documents.

6. Electronic Communications Privacy Act.

Claimants argue that the EFTs were protected under the Electronic Communications Privacy Act of 1986 ("ECPA"), which amended Title III of the Omnibus Crime Control and Safe Streets Act of 1968, often called the wiretap act. 18 U.S.C. §§ 2510-20. The ECPA updated the wiretap act to add prohibitions against the interception of "electronic communications" to the already existing prohibitions against interceptions of oral and wire communications. See 18 U.S.C. § 2510(12). The Barranquilla Claimants maintain that the district court should

have suppressed evidence of the EFTs since they were seized in violation of the ECPA. The Atlantico Claimants contend that the complaint should have been dismissed because the in rem warrants did not satisfy the ECPA, and that for the same reason the district court erred in dismissing their counterclaim under the ECPA.

First, we must determine whether the ECPA is applicable to this case. The statute is directed at regulating surveillance activities. However, the ECPA's legislative history indicates that congress intended to protect "funds transfers among financial institutions". S. Rep. No. 99-541, 99th Cong., 2d Sess. 8 (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3562. There are no cases that apply the ECPA to an electronic funds transfer between banks or to a seizure of

funds after the transfer is complete. For purposes of this appeal, however, we assume that the ECPA may apply to EFTs. Before considering the statute's applicability to these transfers, we first take up other issues raised by the district court.

Judge Weinstein addressed the ECPA at length in Consolidated Bank Cases, 792 F. Supp at 190-93, and briefly in All Funds, 801 F. Supp. at 995-96. Relying on the "relation-back" doctrine, see 18 U.S.C. § 981(b); 21 U.S.C. § 881(h), he held that the ECPA was inapplicable because "in forfeiture proceedings tainted property is considered forfeited at the moment the illegal act is committed." All Funds, 801 F. Supp. at 995-96. Because ownership was transferred instantly at the moment of criminality, he found that the government "reasonably viewed

the funds as its own" at the time of seizure. Id. at 996 (quoting Consolidated Bank Cases, 792 F. Supp. at 192).

However, since Judge Weinstein's decision, the Supreme Court has clarified the parameters of the relation-back doctrine in United States v. 92 Buena Vista Avenue, 113 S. Ct. 1126 (1993). There, the government initiated a civil forfeiture proceeding against land allegedly purchased with proceeds of illegal drug trafficking. The claimant, who had purchased the land with money her friend had given to her, maintained that she was an innocent owner because she did not know the money was traceable to narcotics transactions. The district court held that, under the relation-back doctrine, title to the land vested in the government at the moment the illegal drug tran saction proceeds were used to pay the

purchase price. Therefore, because the claimant had purchased the land after the acts giving rise to the forfeiture had occurred, she had never owned the land.

The Supreme Court disagreed, holding that the government could not "profit from the common-law doctrine of relation back until it has obtained a judgment of forfeiture." Id. at 1137. Otherwise, it would be impossible to launch an innocent-owner defense, which was specifically provided for at 21 U.S.C. § 881(a)(7). The relation-back doctrine is one of "retroactive vesting of title that operates only upon entry of the judicial order of forfeiture or condemnation." Id. at 1138 (Scalia, J., concurring).

In light of Buena Vista, Judge Weinstein's application of the relation-back doctrine was incorrect. Because the government cannot contend that it owns

the defendant properties until a judgment of forfeiture is entered against them, we must examine the ECPA's applicability to the EFTs.

The ECPA prohibits interceptions of electronic communications, see 18 U.S.C. § 2511(1), but no "device" was used to obtain the information as contemplated by the ECPA. The statute defines "intercept" as

> the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

18 U.S.C. § 2510(4) (emphasis added). Liability under the ECPA is therefore predicated on the use of a "device". See United States v. Turk, 526 F.2d 654, 658 (5th Cir.) (act requires "contemporaneous acquisition of the communication through the use of the device"), cert. denied,

429 U.S. 823 (1976). Because the government did not use any type of "device" to obtain the EFTs and information, no "interception" occurred.

The district court, therefore properly rejected all of the claimants' arguments under the ECPA.

7. Wire Transfer as a Res.

Claimants argue that EFTs are not seizable properties for purposes of the civil forfeiture statutes because they are merely electronic communications. They claim that an EFT is not a direct transfer of funds, but rather a series of contractual obligations to pay. Furthermore, they define an EFT as "an intangible property, which not only cannot be stopped once transmitted, but the Intermediary Bank upon accepting it cannot alter from the instructions contained therein." Finally, they claim that only

after a transmission is complete and the communication is accepted and received by the beneficiary does it become a seizable res.

Section 881 of Title 21 provides for the seizure of "moneys, negotiable instruments, securities, or other things of value * * * all proceeds traceable" to narcotics transactions. 21 U.S.C. § 881(6). Similarly, 18 U.S.C. § 981(a)(1)(A) provides for the seizure of "any property, real or personal, involved in a transaction or attempted transaction * * * or any property traceable to such property."

The claimants' conception of the intermediary banks as messengers who never hold the goods, but only pass the word along, is inaccurate. On receipt of EFTs from the originating banks, the intermediary banks possess the funds, in

the form of bank credits, for some period of time before transferring them on to the destination banks. While claimants would have us believe that modern technology moved the funds from the originating bank through the intermediary bank to their ultimate destination without stopping, that was not the case. With each EFT at least two separate transactions occurred: first, funds moved from the originating bank to the intermediary bank; then the intermediary bank was to transfer the funds to the destination bank, a correspondent bank in Colombia. While the two transactions can occur almost instantaneously, sometimes they are separated by several days. Each of the amounts at issue was seized at the intermediary bank after the first transaction had concluded and before the second had begun.

Our decision in United States v. Banco Cafetero Panama made it cleat that a bank credit is a seizable res. 797 F.2d 1154, 1158 (2d Cir. 1986) (bank credit is "clearly 'traceable proceeds' under the forfeiture statute") (Banco Cafetero). We also held that moving "traceable proceeds" from bank to bank would not insulate them from forfeiture. "Since commingled assets, traceable to drug proceeds, are forfeitable, the bank's money remains vulnerable to forfeiture when the money is moved into its account at a second bank or into a second bank's account at a third bank." Id. at 1161; see also Joint Explanatory Statement of Titles II and III, Psychotropic Substances Act of 1978, Pub. L. No. 95-633, reprinted in 1978 U.S.C.C.A.N. 9518, 9522 ("proceeds * * * involved in intervening legitimate transactions, or other

wise changed in form * * * still * * * subject to forfeiture" as long as "trace able connection to an illegal transaction in controlled substances exist[s]").

Therefore, an EFT while it takes the form of a bank credit at an intermediary bank is clearly a seizable res under the forfeiture statutes.

B. Probable Cause.

Unless a claimant challenges the validity of the seizure, as in a motion to suppress, the government is not called upon to demonstrate probable cause until trial of the forfeiture action, see $37,780 in United States Currency, 920 F.2d at 163 (applying Banco Cafetero, 797 F.2d at 1162), or perhaps on a summary judgment motion. Although the government succeeded in two pretrial probable-cause hearings, one before Magistrate Judge Chrein and one before Judge Weinstein,

and in a full-blown jury trial, claimants still contend that the government failed to meet its burden of proving probable cause.

Both for seizures made under in rem warrants and for warrantless seizures under § 881, the government bears the initial burden of establishing probable cause for instituting the forfeiture proceeding, see 21 U.S.C. § 881(d) (incorporating customs procedures); 19 U.S.C. § 1615 (customs laws), that is, "probable cause to believe that the properties are the fruits of illegal drug activity". See United States v. 228 Acres of Land and Dwelling Located on Whites Hill Road, 916 F.2d 808, 811-12 (2d Cir. 1990) (Whites Hill), cert. denied, 498 U.S. 1091 (1991).

Since 1986 our caselaw has consistently relied on Banco Cafetero for the

proposition that, to establish probable cause, the government must have "reasonable grounds" to believe the property is subject to forfeiture, and that these grounds must rise above the level of "mere suspicion". 797 F.2d at 1160. See, e.g., United States v. 15 Black Ledge Drive, 897 F.2d 97, 101 (2d Cir. 1990) (Black Ledge Drive); Livonia Rd., 889 F.2d at 1267; United States v. One 1986 Mercedes Benz, 846 F.2d 2, 4 (2d Cir. 1988) (per curiam). However, we seem to have recently articulated apparently inconsistent formulations of how far above "mere suspicion" the probable-cause burden lies. While in United States v. $31,990 in U.S. Currency, 982 F.2d 851, 854 (2d Cir. 1993) (citation omitted), we stated that the "government must have reasonable grounds to believe that 'a substantial connection exists

between the money to be forfeited and the exchange of a controlled substance'", in St. Nicholas Ave., 983 F.2d at 403, we said that "[t]here need not be a substan tial connection between the drug activities and the property in question, but only a nexus between them." We therefore take this opportunity to resolve this apparent contradiction.

As authority for the "substantial connection" standard, the $31,990 in U.S. Currency decision quotes United States v. United States Currency in the Amount of $228,536.00, 895 F.2d 908, 916 (2d Cir.), cert. denied, 495 U.S. 958 (1990), which in turn relies on Banco Cafetero, 797 F.2d at 1160. However, Banco Cafetero does not state that a "substantial connection" must be shown, only that the government must have "probable cause to connect the property with narcotics ac

tivity". 797 F.2d at 1160 (emphasis added).

Moreover, on several occasions we have specifically declined to adopt a "substantial connection" standard. See United States v. 38 Whalers Cove Drive, 954 F.2d 29, 33 (2d Cir.) (Whalers Cove), cert. denied, 113 S. Ct. 55 (1992); Livonia Rd., 889 F.2d at 1269; United States v. One 1974 Cadillac Eldorado Sedan, 548 F.2d 421, 423 (2d Cir. 1977). Our decisions in $31,990 in U.S. Currency, 982 F.2d 851, and United States Currency in the Amount of $228,536.00, 895 F.2d 908, are the only second circuit cases to the contrary. Examining the facts of those two cases, we note that application of the lower "nexus" standard, rather than the "substantial connection" standard, would not have affected their results.

In $31,990 in U.S. Currency, the

government failed to establish probable cause to forfeit money seized from the trunk of a cab. 982 F.2d at 854-56. The claimant, who had been a cab fare they day before the seizure, said he had inad vertently left his money in the cab. The government's evidence consisted of the large amount of cash seized, the manner in which it was packaged, the cab driver's story regarding who owned the money, parallels between the cab's itinerary and that of a drug courier, and the cab driver's possession of half a gram of cocaine. Id. at 853-55. None of the people involved had ever been linked to any criminal activity. Not only did the government fail to show a "substantial connection" between the claimant's property and narcotics, we held that the evidence demonstrated "no more than a suspicion" that the money was the pro

ceeds of drug trafficking. Id. at 856. It goes without saying that evidence failing to amount to more than "mere suspicion" is incapable of establishing a "nexus".

In United States Currency in the Amount of $228,536.00, the evidence supporting probable cause included tape recordings of numerous conversations implicating the claimant in drug trafficking, tax records, and eyewitness testimony detailing the claimant's possession, processing, and sales of large amounts of cocaine. 895 F.2d at 911. Application of the "nexus" standard there would have had no effect, since the government's case satisfied the higher "substantial connection" standard.

Under all these circumstances, we are satisfied that the weight of authori ty in the second circuit indicates that

the government must demonstrate only a "nexus between the seized property and illegal drug activity, not a "substantial connection". See St. Nicholas Ave., 983 F.2d at 403; United States v. One 1987 Jeep, 972 F.2d 472, 476 (2d Cir. 1992); Whalers Cove, 954 F.2d at 33; United States v. One 1974 Cadillac, 575 F.2d 344, 345 (2d Cir. 1978) (per curiam); One 1974 Cadillac Eldorado Sedan, 548 F.2d at 423.

To show that nexus when the res is a bank account, the government must estab lish that there is probable cause to believe the funds represent proceeds traceable to drug transactions, see St. Nicholas Ave., 983 F.2d at 403; it is not required to link the monies to any one particular transaction. See Livonia Rd., 889 F.2d at 1269 (citing Banco Cafetero, 797 F.2d at 1160). The government must

establish "reasonable grounds", based on more than "mere suspicion", that the funds are subject to forfeiture. Banco Cafetero, 797 F.2d at 1160; Livonia Rd., 889 F.2d at 1267. Curiously, this standard of proof can be less stringent than the typical "prima facie proof". Banco Cafetero, 797 F.2d at 1160. A finding of probable cause may be based on hearsay, even hearsay from confidential informants, see Livonia Rd., 889 F.2d at 1267, or circumstantial evidence, see St. Nicholas Ave, 983 F.2d at 405, particularly in cases involving bank accounts, money, or other fungible assets. See id. ("only proof demonstrating probable cause is likely to be circumstantial, revealing unexplained wealth in conjunction with evidence of drug trafficking").

Claimants argue that the evidence presented here was illegally seized and

therefore provided an impermissible basis for a finding of probable cause. As discussed above, however, there is no basis for suppressing the evidence derived from the seizures under either the fourth amendment or federal statutes.

The machinery of our civil forfeiture laws permits the government to seize property without probable cause, institute a civil forfeiture proceeding, and then use civil discovery as a means of accessing information necessary to effect a forfeiture. Because the final probable-cause determination rests on information presented in the forfeiture action, the risk to claimants of being deprived of their property is extremely high. Despite this apparent unfairness, the precedents of this court and the Supreme Court, as well as the relevant statutes and rules, seem to require this result.

At this point in the development of for feiture law, any change in the balance of this unique procedural system must come either from the Supreme Court or from congress.

Claimants also assert that even if the evidence was properly admitted at trial, the government failed to demonstrate "reasonable grounds" for the forfeiture of their funds. Under 21 U.S.C. § 881, probable-cause determinations are "made by the trial court's exercise of its judgment in light of all the circumstances." St. Nicholas Ave., 983 F.2d at 405. The government's case included bank records from around the world; documents seized by the Colombian National Police from Cali, Colombia; and testimony of former members of the Cali Cartel, numer ous DEA agents, a Luxembourg police offi cer, a member of the Internal Revenue

Service's criminal investigations division, a United States customs official, and a certified public accountant who reviewed the claimants' business records.

While the claimants argue that the government failed to submit evidence that the "sources" and "destinations" of the seized funds were connected to narcotics activities, the extensive evidence regarding the Santacruz-Londono organization as a whole was more than sufficient to link the defendant funds to illegal drug trafficking. Each one of the claim ants was linked to Santacruz-Londono through the testimony of at least one witness. We hold that the district court properly determined that the government had met its burden of establishing proba ble cause for the forfeitures.

C. Shifting Evidentiary Burden.

After the government has established

probable cause, the burden shifts to the claimant to "demonstrate by a preponderance of the evidence that the factual predicates necessary to show probable cause have not been met or to show claim ant[']s lack of knowledge or consent to drug related activities." St. Nicholas Ave., 983 F.2d at 403; see Black Ledge Drive, 897 F.2d at 102; Livonia Rd., 889 F.2d at 1267 ("claimant must prove either that the property was not used unlawfully * * * or that the illegal use was without the claimant's knowledge or consent"); Banco Cafetero, 797 F.2d at 1160 (claimant bears "ultimate burden"). if the res is a bank account, the claimant bears the burden of proving that the account does not contain proceeds traceable to drug transactions, but rather represents legitimate funds. St. Nicholas Ave., 983 F.2d at 403.

Not only does the burden shift to the claimant opposing forfeiture, but the claimant's burden is heavier than the government's. While the government, to establish a prima facie case for forfeiture, need only demonstrate "reasonable grounds", the owner of the seized proper ty must prove that the defendant property is legitimate "by a preponderance of the evidence", a more stringent standard. United States v. 303 W. 116th St., 901 F.2d 288, 291 (2d Cir. 1990).

Judge Weinstein observed that the structure of the civil forfeiture statutes is "inherently unfair to claimants". All Funds, 801 F. Supp. at 991. While we also might question the wisdom of forcing the owner of the seized property to prove the property is "innocent", rather than making the government prove the property id "guilty", the constitu

tionality of congress's allocation of the burdens of proof in forfeiture cases has been upheld. See Whites Hill Road, 916 F.2d at 814. We therefore stress the need for courts to ensure that what little due process is provided for in the statutory scheme is preserved in practice. See Mary M. Cheh, Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal- Civil Law Distinction, 42 Hastings L. Rev. 1325 (1991) (urging attention to civil law due process implications of current forfeiture practices); See also United States v. All Assets of Statewide Auto Parts, 971 F.2d 896, 905 (2d Cir. 1992) ("We continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due pro

cess that is buried in those statutes.").

As the jury's verdict indicates, Manufacturas J.D. Ltda. and Organizacion J.D. Ltda. successfully proved that their monies were not connected to drug activi ty. In addition, the jury found that Confecciones Elizabeth was and innocent owner. The remaining claimants were unable to show by a preponderance of the evidence that their monies were legiti- mate. Given that "the evidence of drug tainting was overwhelming" and that the claimants presented "implausible stories" and "inconsistent positions", see All funds, 801 F. Supp. at 992, we find that the remaining eighteen amounts were prop erly forfeited.

D. Other District Court Rulings.

1. Sanctioning Counsel.

During discovery, the Barranquilla claimants requested admissions from the

government regarding numerous historical, social, and cultural aspects of Colombia. Because Chief Magistrate Judge Chrein questioned the relevance of these requests and felt they were frivolous, he directed both parties to brief the issue of appropriate sanctions for Barranquilla Claimants' Counsel after the trial. No sanctions were imposed during trial, and ultimately Judge Weinstein denied the government's post-trial motion for sanctions.

On appeal, the Barranquilla Claimants assert that their counsel was "chilled" during the trial by the threat of possible sanctions in violation of their due process rights. The record, however, reveals no evidence that counsel for the Barranquilla Claimants was "chilled" in any way. In the absence of prejudice to the Barranquilla Claimants

from Chief Magistrate Judge Chrein's actions, we find no violation of their due process rights.

2. Permitting Expert-Witness Testimony.

The Barranquilla Claimants claim that they were prejudiced by DEA Agent Michaelis's testimony on the subject of money laundering, because it constituted surprise expert testimony. Michaelis was listed on the government's witness list prior to trial, but not as an expert. When Michaelis took the stand, Judge Weinstein qualified him as an expert and allowed him to testify about Santacruz-Londono's overall money-laundering scheme and techniques. The Barranquilla Claimants argue that they were "substantially prejudiced" by this unexpected expert testimony.

Under the Federal Rules of Evidence, expert Witnesses may testify if their "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Qualified DEA agents who testify as fact witnesses may also give expert opinion testimony about the methods of drug operations. See United States v. Campino, 890 F.2d 588, 593 (2d Cir. 1989), cert. denied, 498 U.S. 866 (1990); United States v. Diaz, 878 F.2d 608, 617 (2d Cir.), cert. denied. 493 U.S. 993 (1989). A decision to allow expert testimony is within the broad discretion of the trial judge and "is to be sustained on appeal unless manifestly erroneous." United States v. Brown, 776 F.2d 397, 400 (2d Cir. 1985), cert. denied, 475 U.S. 1141 (1986) (citation omitted). Furthermore, a district

court's decision to permit a witness who was not listed in the pretrial order to testify will be upheld absent a clear abuse of discretion. Dunlap-McCuller v. Riese Org., 980 F.2d 153, 158 (2d Cir. 1992).

A district court judge must frequently make close discretionary calls regarding the admission of evidence in civil forfeiture proceedings. Indeed, the Supreme Court has recently signalled its willingness, at least with respect to expert testimony, to require more active supervision by the district court. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2796-98 (1993). Because in civil forfeiture proceedings the government is far more favored by the rules than in virtually any other type of judicial proceeding, we think district judges, when making evidentiary decisions

in these cases, should be mindful of the heavy burden placed on claimants.

Agent Michaelis's testimony included an account of his investigation of Santa cruz-Londono and his associates, as well as opinions about their money-laundering activities. Judge Weinstein's determination that his testimony would help the jury was neither "manifestly erroneous" nor a "clear abuse of discretion". Espe cially in light of the jury instructions explaining that the government had not given Michaelis's expert testimony in writing to opposing counsel when they should have, and that an expert's opinion should not be substituted for the jury's own conclusions, we conclude that the claimants were not prejudiced by Agent Michaelis's testimony.

3. Denial of Motion for Judgement Notwithstanding the Verdict.

At the end of the trial, Judge Weinstein denied the Atlantico Claimant's motion for a judgement notwithstanding the verdict. See Fed. R. Civ. P. 50(b). On appeal, the Atlantico Claimant's contend that the district court erred in denying their motion, because the government presented no evidence connecting their funds with narcotics activity.

We review the district court's decision on a motion for judgement notwithstanding the verdict de novo. Song v. Ives Laboratories, 957 F.2d 1041, 1046 (2d Cir. 1992). Therefore, we can disturb the jury's verdict only if we can say, "without considering either the credibility of witnesses or the weight their testimony deserves, that the only conclusion a reasonable factfinder could have reached" is one favoring the Atlantico Claimants. Enercomp, Inc. v.

McCorhill Publishing, Inc., 873 F.2d 536, 541 (2d Cir. 1989). In other words, there must be "`such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or * * * such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against him.'" Song, 957 F.2d at 1046.

Given the overwhelming evidence linking the Atlantico Claimants to drug trafficking and money laundering, the district court properly denied their motion for judgement notwithstanding the verdict.

D. Internal Revenue Service Levy.

On July 29, 1992, the IRS served a notice of Levy on the clerk of the United States District Court for the Southern

District of New York to surrender the funds that were about to be released to Manufacturas J.D. Ltda. and Organizacion J.D. Ltda. The IRS asserted that these two claimants were "nominees or alter egos" of Johnny Daccarett, a delinquent taxpayer who owed the IRS in excess of $3 million. Because Judge Weinstein's judg ment, dated August 5, 1992, directed the clerk to issue a check for those funds to counsel for the Atlantico Claimants, the clerk requested clarification from the court. At that point the government moved to amend the judgement to direct the clerk to honor the IRS levy. Instead of amending the judgement, Judge Weinstein simply entered an order authorizing the clerk of the court to comply with the levy -- which he did, on Septem ber 9, 1992.

Manufacturas J.D. Ltda. and Orga

nizacion J.D. Ltda. claim that Judge Weinstein erred in permitting execution of the IRS levy because (1) the government failed to show that it was issued in accordance with 26 U.S.C. § 7429(a); (2) the Anti-Injunctive Act prevents it, 26 U.S.C. § 7421; (3) Johnny Daccarett has no proprietary interest in their businesses; and (4) the government was circumventing the federal interpleader stat ute and the Federal Rules of Civil Proce dure.

In response, the government argues that the only grounds for noncompliance with an IRS levy are that (1) the entity served with the levy is neither "in possession of" nor "obligated with respect to" the requested property, or (2) the taxpayer's property is "subject to an attachment or execution under any judicial process." 26 U.S.C. § 6332. Since

the validity of the levy and competing claims to the ownership of the funds are not valid reasons for refusing to honor a levy, the court properly directed the clerk to honor the IRS's levy.

If Manufacturas J.D. Ltda. and Organizacion J.D. Ltda. want to pursue their challenge the IRS claim, they must bring a separate wrongful levy action. 26 U.S.C. § 7426.

CONCLUSION

As the use of civil forfeiture against the proceeds of narcotics trafficking increases, it is important to remember that the pertinent statutes are not legislated exceptions to the fourth amendment. Given the relative ease with which the statutory scheme allows the government to seize suspect properties, it is imperative for courts to analyze carefully the forfeiture process in light

of the fifth amendment's due process demands and the fourth amendment's proba ble-cause and warrant requirements. Having done so in this case, we conclude that the government carefully complied with both its statutory and constitution al obligations.

Affirmed.

APPENDIX-E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ORGANIZACION J.D. LTDA. and
MANUFACTURAS J.D. LTDA.,

Plaintiffs,

-against-

UNITED STATES DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, BANCO ATLANTICO, S.A. and THE BANK OF NEW YORK,

Defendants.

Civil Action
No. 92 Civ. 3690
(JBW)

JUDGMENT AND ORDER

(Weinstein, J.)
(Chrein, Ch.M.J.)

WHEREAS, the defendants moved pursuant to rule 12(b) (6) of the federal rules of Civil Procedure to dismiss the complaint; and

WHEREAS, plaintiffs opposed these motions; and

WHEREAS, counsel for the plaintiffs and counsel for the defendants appeared in open court on December 3, 1992; and

WHEREAS, the court, having heard oral argument from counsel for all parties on the defendants' motions, and

having reviewed all papers relied upon by the defendants in support of their motions.

[For the reasons stated orally on the record,]

NOW, THEREFORE, IT IS HEREBY ADJUDGED AND ORDERED that the defendants' motions are hereby granted in their entirety; and it is further

ORDERED that the complaint in this action is hereby dismissed as against all defendants with prejudice; and it is further

ORDERED that no sanctions [or costs or disbursement] shall be awarded.

Dated: Brooklyn, New York
December 4, 1992

Hon. Jack B. Weinstein
United States District Judge

APPENDIX-F

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1498 -- August Term 1992

(Argued May 3, 1993 Decided *Feb 24, 1994*)

Docket No. 93-6019

----------x

ORGANIZACION JD LTDA., and MANUFACTURAS JD, LTDA.,

Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF JUSTICE; DRUG ENFORCEMENT ADMINISTRATION OF THE UNITED STATES OF AMERICA; BANCO ATLANTICO, S.A.; THE BANK OF NEW YORK,

Defendants-Appellees.

----------x

B e f o r e : MESKILL, WALKER,[1] Circuit Judges, and

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[1] The Honorable Constance Baker Motley, United States District Judge for the Southern District of New York, sitting by designation.

MOTLEY, District Judge.

Plaintiffs brought a civil damages action alleging statutory and constitutional violations arising out of governmental seizure of numerous electronic fund transfers alleged to involve proceeds from illicit drug trafficking. The United States District Court for the Eastern District of New York (Jack B. Weinstein, Judge) dismissed the complaint in its entirety.

Affirmed in part, vacated in part, and remanded.

ISIDORO RODRIGUEZ, Barranquilla, Columbia S.A., for Plaintiffs-Appellants.

GARY R. BROWN, Assistant United States Attorney, New York, New York (Mary Jo White, United States Attorney for the Eastern District of New York, Robert L. Begleiter, Varuni Nelson, Jennifer C. Boal, Arthur P. Hui, Assistant United States Attorneys, of counsel), for Defendants-Appellees U.S.

Department of Justice and Drug Enforcement Administration of the United States of America.

MARK SULLIVAN, New York, New York (Townley & Updike, of counsel), for Defendant-Appellee Banco Atlantico, S.A.

MICHAEL D. POVMAN, New York, New York, for Defendant-Appellee the Bank of New York.

Per Curiam:

The facts of this case have been set forth thoroughly in a related appeal previously decided by a panel of this court, familiarity with which is assumed. See United States v. Daccarett, 6 F.3d 37 (2nd Cir. 1993), petition for cert. filed, 62 U.S.L.W. 3454 (U.S. Nov. 15, 1993) (No. 93-1020). Daccarett centered around the 1990 government seizure of numerous electronic fund transfers ("EFTs") alleged to involve the proceeds of illicit drug trafficking, totalling over $12 million. After

a two-month trial, a jury found eighteen of twenty-two seized amounts forfeitable. Notably, the jury found that the amounts claimed by the appellants in this case, Manufacturas J.D. Ltda. and Organizacion J.D. Ltda, were not traceable proceeds of illegal money-laundering and narcotics transactions. See United States v. All Funds on Deposit in Any Accounts Maintained at Merrill, Lynch, Pierce, Fenner & Smith, 801 F. Supp. 984, 993 (E.D.N.Y. 1992) (Weinstein, J.) ("All Funds") (affirmed by Daccarett, supra).

The intended recipients of these various money transfers did not sit by quietly when their funds were seized. These parties sued the intermediary banks for violations of various federal and state statutes. The dis-

trict court granted summary judgement for the banks, holding that they could not be held liable for following governmental orders respecting claimed governmental funds. See Manufacturas Int'l, Ltda v. Manufacturers Hanover Trust Co., 792 F. Supp. 180 (E.D.N.Y 1992) (Weinstein, J.). In another action, various recipients sued the government attorneys who had ordered the banks to seize the funds; the same district judge dismissed this complaint for failure to state a claim. See Abuchaibe Hnos. v. Maltz, No. 92 Civ. 528 (E.D.N.Y. Mar. 11, 1992) (oral decision).

Plaintiffs in this case are two of the appellants from the Daccarett case, which affirmed the district court's rulings in the All Funds case. Before trial in the All Funds case, plaintiffs

brought a six-count civil complaint against two government agencies and two private banks charging them with statutory and constitutional violations arising from the seizures of the EFTs. Prior to the jury trial in the underlying All Funds case, the district court (Jack B. Weinstein, Judge) granted the defendants' motion to dismiss the plaintiffs' complaint, stating from the bench that its ruling was based on the reasons stated in its two earlier decisions in Manufacturas International, Ltda v. Manufacturers Hanover Trust Co., supra, and United States v. All Funds on Deposit in Any Accounts Maintained at Merrill, Lynch, Pierce, Fenner & Smith, No. CV 90-2510, 1992 U.S. Dist. LEXIS 1881 (E.D.N.Y., Feb. 19, 1992) (a pretrial ruling denying the claimants'

motions to vacate the district court's earlier finding of probable cause for the seizures and refusal to suppress certain evidence). Plaintiffs now appeal.

In Daccarett, this court comprehensively explored the legal issues surrounding the All Funds seizures and affirmed the rulings of the district court. Consequently, our discussion of the issues raised by this appeal is brief. For the reasons stated below, we affirm in part the dismissal of the complaint and remand for further proceedings consistent with this opinion.

The Civil Complaint

Counts One and Six of the plaintiffs' civil complaint allege violations of the Fourth and Fifth Amendments of the United States Constitution. This court

in Daccarett affirmed the district court's ruling that the seizures did not violate the Fourth Amendment of the Constitution, See Daccarett, 6 F.3d at 49, and that ruling controls here.

Although Daccarett did not discuss the Fifth Amendment, the Supreme Court's latest pronouncement in this area makes it clear that civil forfeitures can violate the Fifth Amendment as well. See United States v. James Daniel Good Real Property, 114 S. Ct. 492, 499-500 (1993). In James Daniel Good, the Court considered whether, in the absence of exigent circumstances, the Fifth Amendment prohibited the government in a civil forfeiture case from seizing assets without first providing notice and an opportunity to be heard. The Court held that the Fifth Amendment was impli-

cated in civil forfeitures. Id. at 500. Analyzing the civil forfeiture procedure under the three-pronged balancing test of Mathews v. Eldridge, 424 U.S. 319 (1976), the Court ruled that absent exigent circumstances, the government cannot seize an individual's real property via the civil forfeiture mechanism without providing predeprivation notice and an opportunity to be heard. Id. at 501-05.

Because James Daniel Good involved real property, the Court did not address whether personal property is similarly protected by the Fifth Amendment. We need not decide this issue here, however, because the seizures in this matter plainly involved exigent circumstances, and the James Daniel Good Court made clear that seizures involving exigent

circumstances are exempted from predeprivation notice and hearing requirements. Id. at 500. As the Daccarett court reasoned, "[b]ecause the property at issue was fungible and capable of rapid motion due to modern technology, we are satisfied that exigent circumstances were present here." Daccarett, 6 F.3d at 49. Thus, the plaintiffs can claim no Fifth Amendment violation.

Count Two of the complaint alleged two distinct violations of the Electronic Communications Privacy Act of 1986 ("ECPA"), 18 U.S.C. §§ 2510 et seq., which govern interception of wire electronic communications, and §§ 2701 et seq., which govern access to certain stored electronic records. First, plaintiffs claim that they are entitled to civil damages under § 2520 for the al-

leged unlawful "interception" of the EFTs. However, the Daccarett court ruled that the seizures did not constitute "interceptions" under the ECPA because no "device" was used, as required under 18 U.S.C. § 2510(4). See Daccarett, 6 F.3d at 54. Because no "interceptions" occurred, plaintiffs have no cause of action under § 2520.

Second, plaintiffs claim they are entitled to civil damages under § 2707(-a), which provides a civil cause of action for the unlawful access to stored communications in violation of § 2701.

The statute states:

> (a) Cause of action. -- Except as provided in section 2703(e), any provider of electronic communication service, subscriber, or customer aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or internation-

> al state of mind may, in a civil action, recover from the person or entity which engaged in that violation such relief as may be appropriate.

18 U.S.C § 2707(a). We agree with the district court that the defendant banks cannot be held civilly liable under § 2707(a) for a violation of § 2701 because their good faith reliance on a court warrant or order is a complete defense under § 2707(a) for a violation of § 2701 because their good faith reliance on a court warrant or order is a complete defense under § 2707(d) (1). See Manufacturas Int'l, Ltda v. Manufacturers Hanover Trust Co., 792 F. Supp. at 192-93.

However, the government agencies' potential liability under § 2707 is a different matter. Few courts have addressed the complex issues surrounding

the government's possible liability under § 2707(a). We note that the district court's two decisions upon which it relied when ruling from the bench to dismiss the plaintiffs' complaint had no occasion to discuss the government's liability under § 2707(a).

As an initial matter, we address whether a governmental entity can be held civilly liable under § 2707(a). To our knowledge, only two district courts have discussed this question, both of which suggested that a governmental "entity" may be liable under § 2707. See PBA Local No. 38 v. Woodbridge Police Dep't, 832 F. Supp. 808, 823 (D.N.J. 1993); Bodunde v. Parizek, No. 93-C-1464, 1993 U.S. Dist. LEXIS 7365 (N.D. Ill. May 27, 1993). Those courts concluded that prior to the 1986 enact-

ment of the ECPA, the definition of "person" in § 2510(6) already included business entities such as corporations and partnerships, and that in order to give full meaning to the new statutory language, "entity" must be taken to mean governmental entity. They have found support for this conclusion in legislative history that specifically references "governmental entities" as potentially liable under § 2707(a). See S. Rep. No. 541, 99th Cong., 2d Sess.43 (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3597 (stating that an aggrieved party "may recover from any person or entity -- including governmental entities -- who knowingly or intentionally violated this chapter"). We find the analyses of these courts persuasive and hold that governmental "entities" are subject to

liability under § 2707(a).

Apart from this determination, two issues remain: whether the particular plaintiffs in this case are able to bring an action under § 2707(a), and whether the government agents impermissibly violated the ECPA. Because the resolution of these issues requires a more complete factual record, we remand the § 2707(a) claim under Count Two against the government defendants for an initial determination by the district court.

We offer several observations for the benefit of the district court on remand. First, § 2707(a) confines those who may recover damages to "any provider of electronic communication service, subscriber, or customer aggrieved." Plaintiffs here were to be ultimate

beneficiaries of sequential electronic fund transfers. Whether plaintiffs fit within the class of individuals who may bring suit under § 2707(a) is an open question that might well turn on the issue of whether the term "customer" applies to the plaintiffs in the factual circumstances presented here.

Second, if the district court should find that plaintiffs fit within the class of "any provider of electronic communication service, subscriber, or customer aggrieved" under § 2707, a matter as to which we express no opinion, then the court must decide whether the governmental agents in this case complied with the ECPA, or were somehow excused from doing so. Section 2703 of the ECPA lays out the requirements for governmental access to an electronic

communication, satisfaction of which would avoid liability under § 2707(a). Because we believe the district court is in the best position to consider these questions and make appropriate findings of fact in the first instance on remand, we take no position on the merits of this aspect of plaintiffs' § 2707(a) claim against the government.

Counts Three and Four of the complaint alleged breach of contract claims against the defendant banks. Plaintiffs claim that by failing to forward the wire transfers, the intermediary banks failed to follow the wire transfer rules and regulations of
the Federal Reserve System and the Clearing House Interbank Payment System, and that this "breach of contract" caused them damage. In essence, the plaintiffs

claim third-party beneficiary status to the contract between the intermediary banks and the wire transfer systems.

Irrespective of whether the plaintiffs can even make out a claim as a third-party beneficiary under New York law, the private intermediary banks cannot be subject to a damage action because the intervening government actions in ordering the seizures of the EFTs rendered any enforceable contract impossible to perform. See, e.g., RSB Mfg. Corp. v. Bank of Baroda, 15 B.R. 650 (S.D.N.Y. 1981) ("The defense of impossibility extends to judicial action as long as the party seeking to be excused has not caused or failed to prevent the judicial action."); Hamilton Rubber Mfg. Co. v. Greater N.Y. Carpet House, Inc., 47 N.Y.S.2d 210, 211 (N.Y.

Sup. Ct. 1944), aff'd, 269 A.D. 681, 53 N.Y.S.2d 954 (1st Dep't 1945); Restatement (Second) of Contracts § 264 (1981). Accordingly, Counts Three and Four were properly dismissed.

Finally, Count Five of the complaint alleged violations of the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. §§ 3401 et seq. However, as this court explained in Daccarett, the RFPA was "meant to protect those who maintain accounts in their names at financial institutions," and because the plaintiffs "never maintained accounts in their names at the intermediary banks," there was no violation of the RFPA. 6 F.3d at 51-52 (emphasis in original). Thus, the RFPA provides no basis for relief and Count Five, too, was properly dismissed.

Conclusion

For the foregoing reasons, we affirm the dismissal of the civil complaint on Counts One, Three, Four, Five, and Six, and Count Two in part. We vacate and remand that part of Count Two which alleged a claim for civil damages against the government under § 2707(a) for further proceedings consistent with this opinion.

Parties to bear their own costs.

No. 94-1753

Supreme Court, U.S.
FILED
MAY 22 1995
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MANUFACTURAS INTERNACIONALES LTDA; ABUCHAIBE HNOS LTDA; COMERCIAL SAMORA LTDA; CREACIONES VIVIANA LTDA; COMERCIAL ESTRELLA LTDA; CONFECCIONES Y TEJIDOS NACIONALES LTDA; MANUFACTURERA DEL ATLANTICO LTDA; and INDUSTRIAS MARATHON LTDA,

Petitioners,

—v.—

MANUFACTURERS HANOVER TRUST BANK COMPANY; BANCO ATLANTICO and THE BANK OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER PETITIONERS HAVE SHOWN SPECIAL AND IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI WHERE THE SECOND CIRCUIT COURT OF APPEALS HAS THREE TIMES CORRECTLY HELD THAT NO "INTERCEPTION" OCCURRED HERE.

II. WHETHER PETITIONERS HAVE SHOWN SPECIAL AND IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI WHERE THE SECOND CIRCUIT COURT OF APPEALS HAS TWICE CORRECTLY HELD THAT THE RESPONDENT BANKS' RELIANCE UPON COURT WARRANTS, COURT ORDERS, DEA SUBPOENAS AND THE AUTHORITY OF THE UNITED STATES UNDER THE FEDERAL FORFEITURE LAWS AFFORDS THE BANKS A COMPLETE DEFENSE AGAINST PETITIONERS' CLAIMS.

III. WHETHER, EVEN ASSUMING THE SECOND CIRCUIT'S DECISION HERE WERE SOMEHOW ARGUABLY INCORRECT, PETITIONERS HAVE PROVIDED ANY SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT.

LIST OF PARTIES

Pursuant to Rule 24.1(b) of the Supreme Court of the United States, the following is a list of parties to the petition:

The Petitioners are Manufacturas Internacionales Ltda.; Abuchaibe Hnos Ltda.; Comercial Samora Ltda.; Creaciones Viviana Ltda.; Comercial Estrella Ltda.; Confecciones y Tejidos Nacionales Ltda.; Manufacturera Del Atlantico Ltda.; and Industrias Marathon Ltda.

Respondents are Manufacturers Hanover Trust Company, Banco Atlantico, S.A. and The Bank of New York.

Pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States, Manufacturers Hanover Trust Company (whose successor by merger is Chemical Bank) identifies the following parent companies, subsidiaries and affiliates:

> Chemical Banking Corporation, Brown & Company Securities Corporation, CBC-USA, Inc., CBC Capital Partners, Inc., CBC Holding (Delaware), Inc., Chemical Bank Delaware, CBD Holdings Ltd., SFC Agency, Inc. (OH), Chemical Data Services Corporation, Chemical Insurance Agency, Inc., The CIT Group Holdings, Inc., Chatham Ventures, Inc., Chemadvertising, Inc., Chemical Bank, Chemical Bank National Association, Margaretten Financial Corporation, Chemical Residential Mortgage Corporation, Margaretten Insurance Agency Inc., MRG Finance Company, Margaretten Financial Services, Margaretten Realty Co., Chemical Business Credit Corp, Chemical Capital Corporation, Chemical Capital Financing, Ltd., Chemical Commercial Real Estate Advisors, Inc., Chemical Connecticut Corporation, Chemical Educational Services Corporation, Tuition Plan Financial Services, Inc., Chemical Equity Incorporated, Chemical Venture Capital Corporation, Chemical Corporate Advisers, Inc., Chemical Financial Services, Inc., Chemical Financial Services Corporation, Ltd., Chemical Financial

Services Corporation (AZ), Chemical Financial Services Corporation (CA), Chemical Financial Services Corporation (FL), Chemical Financial Services Corporation (GA), Chemical Financial Corporation (IL), Chemical Financial Services Corporation (NC), Chemical Financial Services Corporation of Penn., Chemical Financial Services Corporation (TX), Chemical Financial Services Corporation (WA), Chemical Financial Services Corporation (CO), Chemical Financial Services Corporation (IN), Chemical Financial Services Corporation (KY), Chemical Financial Services Corporation (LA), Chemical Financial Services Corporation (SC), Chemical Financial Services Corporation (TN), Chemical Financial Credit Services Corporation (KY), Sun States Life Insurance Company, Great Lakes Insurance Company, Lorry, Ltd., Chemical Financial Investment Corporation, Chemical Financial Services Corporation (OH), Chemical Financial Acceptance Corporation (OH), Chemical Futures, Inc. (Inactive), Chemical Futures & Options, Inc., Chemical Futures Management, Inc., Chemical Holding Delaware Inc., CBC Holdings (California) Inc., Van Deventer & Hoch, Chemical Thrift Holdings Inc., Chemical Bank F.S.B., Chemical Trust Company of California, Chemical Investments, Inc., Chemical International Capital Finance Limited, Chemical Mortgage Securities, Inc., Chemical New Jersey Holdings, Inc., Chemical Bank New Jersey National Association, Chemical Investor Services, Inc., Princeton Bank and Trust Company National Association, Chemical New York, Inc., Chemical New York - N.V., Chemical Real Holdings, Inc., Chemical Realty Corporation, Chemical Securities Inc., Chemical Structured Municipal Products Corporation, Chemical Securities Holdings, Inc., Chemical Shareholders Services of California, Inc., Chemical Shareholder Services Partners Inc., Chemical Mellon Shareholder Services (50%), Chemical Technologies Corporation, Electronic Customer Services, Inc., Chem-

ical Temporaries Incorporated, Chemical Trading Management Corporation, COREQ, INC., CVP Management Corp., Manufacturers Hanover Leasing International Corp., Manufacturers Hanover Leasing (Nassau) Limited, Manufacturers Hanover Arrendamento Mercantil S.A., Manufacturers Hanover Wheelease, Inc., MH World Trade Corporation Mexico, Offshore Equities, Inc., The Andean Fund, Inc., Equifin, Chemical Overseas Holdings, Inc., Select Andean Holdings, Inc., Select Brazilian Holdings, Inc., Chempar Participacoes e Emprendementos Ltd., Select Capricorn Holdings, Inc., Select Cassiopeia Holdings, Inc., Select Life Holdings, Inc., Select Orion Holdings, Inc., Select Pacific Holdings, Inc., Select Rio Grande Holdings, Inc., Select Southern Holdings, Inc., Select Southern Star Holdings, Inc., Sociedad Mexicana Para La Industria Y El Comercio S.A., The Portfolio Group, Inc., Texas Commerce Equity Holdings Inc., Texas Commerce Operating Services Inc., Chemical Securities of Texas, Inc., First City, Texas - Fiduciary Services, Inc., Texas Commerce Equities Inc., Pyramid Agency, Inc., Texas Commerce Information Systems, Inc., Texas Commerce Bank Foundation, Inc., Texas Commerce Funding Company, TexCom Venture Capital, Inc., Texas Commerce Shareholders Company, Texas Commerce Services Company, Texas Commerce Leasing Company, Texas Commerce Investment Management Co., Texas Commerce Bank-San Angelo, N.A., Texas Commerce Trust Company of New York, Texas Commerce Bank National Association Houston, Texas Commerce Equipment Leasing Company, Texas Commerce International Leasing Company, Texas Commerce Investment Company.

Chemical Bank owns a fifty percent interest or more in the following subsidiaries:

CB Capital Investors, Inc., Chemical Acceptance Corporation, Chemical Acceptance Corporation I, Chemical

Mortgage Acceptance Corporation, Chemical Bank of Canada, Chemical Clearing House Services, Inc., Chemical Commercial Mortgage Banking Corp., Chemical Commercial Mortgage Securities Corp., Chemical Community Development, Inc., Chemco International, Inc., Chemical International Finance, Ltd., Banco Chemical (Portugal) S.A., Chemical Bank - France, Chemical Bank A.G., Chemical Investment Bank Limited, Chemical Bank CB, S.A., Chemical Global Investors Limited, Chemical Investment Services Corp., Chemical Mortgage Company, Chemgraphics Systems, Inc., ChemLease Worldwide, Inc., ChemNetwork Processing Services, Inc., Chem Credit, Inc., Manufacturers Hanover Leasing Corporation, MH Financial Management Systems, Inc.

Pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States, The Bank of New York identifies the following parent companies, subsidiaries and affiliates:

The Bank of New York Company, Inc., ARCS Mortgage Holdings, Inc., ARCS Mortgage, Inc. (California), Armot Corporation, Armot Corporation of Washington, B.N.Y. Holdings (New Jersey) Corporation, The Bank of New York N.A., NLB Investment Company, Inc., Natcom Investments, Inc., B.N.Y. Holdings (Delaware) Corporation, The Bank of New York (Delaware), The Bank of New York Overseas Finance N.V., Lease Equities (Delaware) Corporation, Lease Equities (Texas) Corporation, BNY Business Center, Inc., BNY Capital Corporation, BNY International Trade, Inc., BNY Trade Insurance, Ltd., BNY One Leasing Corporation, BNY Personal Brokerage, Inc., Capital Trust Company, Eastern Trust Company, Irving Financial Centers, Inc., North American Bancorp., Inc., The Bank of New York Life Insurance Company, Inc., The Bank of New York Trust Company, The Bank of New York Trust Company of California, The Bank of New York Trust Company of Florida N.A.;

The Bank of New York, BNY Associates Incorporated, BNY Leasing Corporation, Airlease Incorporated, Airlease Foreign Sales Corporation, BNY Capital Funding Corp, BNY New Amsterdam, Inc., Flugel FSC, Ltd., BNY Waterworks, Inc. (99.09%), BNY Wings, Inc., BNY Wings FSC, Inc., ILC Gear Inc., IRE-1, Inc., IRE-AC, Inc., New GSM Holding Corporation, IRE-Aurora, Inc., IRE-BC, Inc., IRE-SB, Inc., IRE-WWP, Inc., Irving Leasing Foreign Sales Corporation, ENMASS, Inc., Flamingo Plaza Realty, Inc., Forty-First Street Holdings, Inc., GH Holdings Inc., Green Island Realty, Inc., Hamlet Holdings, Inc., Horizon at Wayne, Inc., Hulfish Beverage Corp., Hull Junction Holding Corp., IDC (Queens) Corp., Jefferson Plaza Properties Inc., Karpen Properties, Inc., Village Beverage Co., Inc., Landmark Tower, Inc., Linroad Holding Corp., Linroad Realty, Inc., Longtuco Realty Corporation, MacArthur Holdings, Inc., Miami Kendall Properties, Inc., Mid-Plaza Holdings, Inc., MTD Shipping Inc., Newmex Holding, Inc. NO FRILLS, Inc., Odysseus Properties, Inc., One Wall Street Corporation, OVD Holding Inc., Pacshore Holding, Inc., PBP Holdings Inc., Plymouth Holding Inc., Pohio Holding Inc., PresPark, Inc., Rivohio Holding Inc., Robin Investments, Inc., Station Mall, Inc., Techcen, Inc.. Techcen II, Inc., The Fourteen South Broadway Corporation, Valley Premises, Inc., Venetia Realty, Inc., VHPL II, Inc., Walnut Hill Center Corporation, Willowtrail Holding Inc., Wolham Holdings, Inc., Wolpheas Holdings, Inc., Wolstat Holdings Inc., WP Hotel, Inc., Island Waterworks, Inc. (90%), ITC Leasing Corporation, Northern Waterworks, Inc. (99.09%), Waterwheel, L.P. (Partnership) (99%), BNY Generator Lessor, Ltd., BNY Turbine FSC, Ltd., BNY Turbine FSC II, Ltd., BNY Turbine FSC III, Ltd., BNY Turbine FSC IV, Ltd., JCPL Leasing Corp., BNY Financial Corporation, BNY Information Services, Inc., BNY International Financing Corporation, BNY Special Nominees No. 1 Limited, The Bank of New York

(Nominees), Ltda., BNY (Nominees) Limited, The Bank of New York Assessoria E. Consultoria, Ltd., The Bank of New York Capital Markets Limited, The Bank of New York Trust Company (Cayman), Limited, Banco Credibanco, S.A. (50%), BK Investments, C.A., BNY Australia Limited, BNY Australia Finance Holdings Limited, BNY Worldwide Services Co., Ltd., Compania Dowson, S.A., Irving Trust Company (Nominees) Ltd., Wing Hang Bank, Limited (49%), Banco Weng Hang S.A.R.L., BNY One Capital Corporation, The Bank of New York Commercial Corporation, The Bank of New York Consumer Leasing Corporation, The Bank of New York, S.A., ITCMED, Inc., Sloane Holdings, Inc. (66-2/3%), EPHCO, Inc., LCHCO, Inc., SCHCO, Inc., XYXYXY Corporation, Real Estate Subsidiaries, 65th Street Townhouse, Inc., 200 Lombard St. Corp., Allohio Holding Inc., Bogohio Holding Inc., Burbank Holdings Inc., Ca-Tar Properties, Inc., Claymont Holdings, Inc., Cronos Properties, Inc., Design Center Bus Company, Inc., Eight Stamford Realty Corporation, Empark, Inc., Empro Properties, Inc.

Banco Atlantico has no parent companies or subsidiaries.

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COUNTERSTATEMENT OF THE CASE

Respondents Chemical Bank (as successor to Manufacturers Hanover Trust Company ("MHT")), The Bank of New York ("BNY") and Banco Atlantico, S.A. ("Banco Atlantico") (collectively the "Banks") respectfully submit this joint brief in opposition to Petition No. 94-1753 submitted by Manufacturas Internacionales Ltda., Abuchaibe Hnos Ltda., Comercial Samora Ltda., Creaciones Viviana Ltda., Comercial Estrella Ltda., Confecciones Y Tejidos Nacionales Ltda., Manufacturera Del Atlantico Ltda. and Industrias Marathon Ltda. (collectively "Petitioners").

A. THE UNDERLYING ACTIONS

This petition for a writ of certiorari marks the fifth occasion that this Court has been asked to review the seizure and forfeiture of electronic funds transfers ("EFT's") stemming from a 1990 international investigation into the money laundering activities of the Cali drug cartel. This investigation led to the forfeiture to the United States Government of some ten million dollars in a civil forfeiture action entitled *United States v. All Funds On Deposit In Any Accounts Maintained At Merrill Lynch, et al.* ("*All Funds*"), 801 F. Supp. 984 (E.D.N.Y. 1992), *aff'd sub nom., United States v. Daccarett* ("*Daccarett*"), 6 F.3d 37 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1294, 1295 (1994). *See also Organizacion JD Ltda. v. United States Department of Justice* ("*Organizacion JD*"), 18 F.3d 91 (2d Cir.), *cert. denied*, 114 S. Ct. 2679 (1994); *Manufacturas International, Ltda v. Manufacturers Hanover Trust Co.* ("*Consolidated Cases*"), 792 F. Supp. 180 (E.D.N.Y. 1992), *appeal withdrawn per stipulation*, No. 92-7360 (2d Cir. 1992), *cert. denied*, 114 S. Ct. 1295 (1994), *aff'd*, 47 F.3d 1159 (2d Cir. 1995).

The Banks maintained correspondent banking relationships with various Colombian banks at which Petitioners allegedly maintained accounts. The Banks were recipients of EFT's originating from certain European banks; the Banks were in

turn to transfer corresponding amounts of funds to their Colombian correspondents' accounts. The proceeds of the EFT's, however, were seized by the Government after receipt by the Banks, but before the transfers to the Colombian banks' accounts were effected. These proceeds subsequently were forfeited to the United States after a jury in *All Funds* determined that the EFT's were traceable to illegal transactions in narcotics and that Petitioners were not "innocent owners" of the funds.

Here, Petitioners sued the Banks for having complied with various Warrants for Arrest of Articles *In Rem*, Court Orders, Drug Enforcement Agency ("DEA") Administrative Subpoenas and instructions from the United States Attorney, all issued in connection with *All Funds*, which compelled the Banks to disclose information contained in EFT payment orders, and to pay the proceeds of the EFT's into Court.

Petitioners asserted in the District Court that, in complying with the Warrants for Arrest and other directives, the Banks violated the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2501, *et seq.* (the "Wiretap Act"), as amended by the Electronic Communications Privacy Act, 18 U.S.C. § 2701, *et seq.* (the "ECPA"); the Right to Financial Privacy Act, 12 U.S.C. § 3401, *et seq.*; and Uniform Commercial Code Article 4-A. Petitioners also asserted that, among other things, the Banks violated their "right to privacy" under New York law, and that, by paying the EFT proceeds into District Court, the Banks breached third-party contracts of which Petitioners were beneficiaries. The District Court granted summary judgment to the Banks dismissing all of Petitioners' claims. *Consolidated Cases*, 792 F. Supp. 180.

On appeal, Petitioners sought review only of that portion of the District Court's decision that held that Petitioners had no claim under the Wiretap Act or the ECPA (collectively the "ECPA"). The Second Circuit affirmed the District Court's dismissal of these claims against the Banks. 47 F.3d 1159 (Pet. App. B).

B. PROCEDURAL HISTORY

In three separate but related actions stemming from the 1990 civil forfeiture action, the Second Circuit has ruled adversely to the positions advanced herein by Petitioners. Set forth below is a summary of each of the related cases.

1. *All Funds/Daccarett*

All Funds (801 F. Supp. 984) (which was reported on appeal as *Daccarett* (6 F.3d 37)) resulted from an extensive money laundering investigation in which the United States claimed that the EFT's at issue in this petition (among others) were subject to forfeiture as the proceeds of narcotics crimes. The Banks were not parties to *All Funds*, but acted as intermediary banks for the EFT's and as such complied with court warrants, court orders, DEA subpoenas and instructions given by the United States pursuant to its statutory authority under the federal forfeiture laws. Petitioners were claimants to certain EFT's seized by the United States.

Following a two-month trial, the *All Funds* jury returned a verdict forfeiting approximately $10,000,000 to the United States and returning approximately $300,000 to two of the claimants, neither of which is a party to this action. The claimants whose funds were forfeited, including all the Petitioners here, appealed to the Second Circuit, which affirmed the judgment of the District Court in a decision dated September 10, 1993, and denied a petition for rehearing on October 6, 1993. On March 21, 1994, this Court denied the *Daccarett* appellants' petition for a writ of certiorari. 114 S. Ct. 1294, 1295.

2. *The Consolidated Cases*

While *All Funds* was pending in the Eastern District of New York, Petitioners filed ten separate actions in the Southern District of New York against the Banks. These actions were consolidated and transferred to the Honorable Jack B.

Weinstein in the Eastern District, and the Banks moved to dismiss the consolidated action pursuant to Fed. R. Civ. P. 12(b)(6). Judge Weinstein converted the motion to one for summary judgment and, following the submission of affidavits and memoranda by both sides and oral argument, granted the Banks' motion in its entirety on February 27, 1992. *Consolidated Cases*, 792 F. Supp. 180.

After the entry of the order dismissing the complaint, Petitioners filed a notice of appeal. Before perfecting the appeal, however, the parties voluntarily entered into a stipulation in which Petitioners agreed to withdraw their appeal with leave to reinstate "within 15 days after final disposition, including all appeals of [*All Funds*]." Petitioners subsequently attempted to repudiate the stipulation and moved to reinstate their appeal before final disposition of *Daccarett*, but the Second Circuit denied their motion.

In addition, despite the stipulation and the fact that no appeal was pending in the Court of Appeals, Petitioners filed seven separate petitions for writs of certiorari to this Court, raising essentially the same arguments they raise here. On March 21, 1994, this Court denied the petitions for writs of certiorari. 114 S. Ct. 1295.

Following the denial of the petition for a writ of certiorari in *Daccarett*, Petitioners perfected their appeal pursuant to the terms of the stipulation. Once again, the Second Circuit (by a panel entirely separate from that in *Daccarett*) reviewed the seizure and forfeiture of the EFT's and, on January 30, 1995, affirmed the District Court's dismissal of the ECPA claims against the Banks. Pet. App. B.

3. *Organizacion JD*

After the conclusion of the *All Funds* trial, the two claimants whose funds had not been forfeited brought an action against the United States Department of Justice, The DEA, Banco Atlantico and BNY. On December 3, 1992, the

District Court granted motions by the Banks and the United States to dismiss the complaint under Fed. R. Civ. P. 12(b)(6). Following the dismissal of the action, the plaintiffs, who were represented by the same counsel as the Petitioners here, appealed to the Second Circuit. *See Organizacion JD*, 18 F.3d 91.

The Second Circuit (by a panel entirely separate from those in *Daccarett* and this action) affirmed the dismissal of all counts against the Banks, but reversed and remanded the portion of the District Court's decision that dismissed claims against the United States under 18 U.S.C. § 2707(a) for alleged violations of the ECPA. *See Organizacion JD*, 18 F.3d at 95.

While their appeal was pending in the Second Circuit, the *Organizacion JD* appellants petitioned for a writ of certiorari from this Court. The Supreme Court denied the petition on March 21, 1994. 114 S. Ct. 1295. Following the issuance of the Second Circuit's decision, the *Organizacion JD* appellants again sought a writ of certiorari from this Court, and again were denied. 114 S. Ct. 2679.

C. BACKGROUND

This action arises from the Banks' compliance with various Warrants for Arrest of Articles *In Rem*, Court Orders, subpoenas and instructions from the United States Attorney, all issued in connection with the *All Funds* civil forfeiture action. Petitioners claimed to be the ultimate beneficiaries of some of the EFT's seized by the Government and ultimately forfeited.

The forfeitures in *All Funds* were the result of an international investigation into the activities of the Cali cartel, which imports approximately 3,000 kilograms of cocaine into the United States every month. *Daccarett*, 6 F.3d at 43.[1] In the

[1] As the Second Circuit noted in *Daccarett* at 43, the magnitude of this problem for the United States and its financial institutions cannot be underestimated:

(footnote continued on next page)

two-month jury trial in *All Funds*, Petitioners failed to establish that the proceeds of the EFT's were not traceable to transactions in illegal narcotics by the Cali cartel or that Petitioners were innocent owners of the EFT proceeds. Indeed, while Petitioners claim that they are merely Colombian clothing export companies, the evidence linking Petitioners to illegal drug trafficking and money laundering by the Cali cartel was, in the Second Circuit's view, "overwhelming." *Daccarett*, 6 F.3d at 44, 57, 59.

In July and August 1990, the Banks acted as intermediary banks for the EFT's and complied with court warrants, court orders and instructions from the United States Attorney by attaching the EFT proceeds and paying them into Court. The Banks also complied with lawful DEA subpoenas requiring them to disclose relevant account information concerning the EFT's.

None of the Petitioners maintained accounts at the Banks. Rather, they allegedly were customers of Colombian banks that, in turn, maintained correspondent banking relationships with one or more of the Banks. To effect the wire transfers, the Banks were supposed to credit the Colombian banks' correspondent accounts in New York. The Colombian banks would, in turn, advise their customers of the credits to their accounts. *See Consolidated Cases*, 792 F. Supp. at 185.

Illegal sales of controlled substances generate billions of dollars in revenue every year. Narcotics traffickers continually seek to make their illegal income appear legitimate. When international drug conglomerates attempt to move their profits beyond the reach of law enforcement authorities, these monies are frequently funneled through financial institutions in the United States. Money laundering has become so sophisticated "that it is not unusual to find an intricate web of domestic and foreign bank accounts, dummy corporations and other business entities through which funds are moved, almost instantaneously, by means of electronic fund transfers." House Committee on Banking, Finance and Urban Affairs, H.R. Rep. No. 746, 99th Cong., 2d Sess. 16 (1986).

As the Second Circuit noted in *Daccarett*, 6 F.3d at 54:

> On receipt of EFT's from originating banks, the intermediary banks possess the funds, in the form of bank credits, for some period of time before transferring them on to the destination banks. While claimants would have us believe that modern technology moved the funds from the originating bank through the intermediary bank to their ultimate destination without stopping, that was not the case. With each EFT at least two separate transactions occurred: first, funds moved from the originating bank to the intermediary bank; then the intermediary bank was to transfer the funds to the destination bank, a correspondent bank in Colombia. While the two transactions can occur almost instantaneously, sometimes they are separated by several days. Each of the amounts at issue was seized at the intermediary bank after the first transaction had concluded and before the second had begun.

See also Consolidated Cases, 792 F. Supp. at 187 ("In the instant case the sending banks are in Europe, the intermediary banks are in New York, and the correspondent banks are in Colombia. The funds transfers were seized at the intermediary banks before the funds were credited to the Colombian correspondent banks.")

The Banks, as intermediary banks, were necessary parties to and intended recipients of the EFT communications. The EFT's could not be completed unless and until the Banks were told that their accounts had been credited, and how they were to apply the funds. It is this information necessary to the EFT's that the Banks are alleged to have disclosed to the Government in violation of the ECPA. However, as the Second Circuit recognized in *Daccarett*, *Organizacion JD* and *Consolidated Cases*, no "device" was used to effectuate the seizures, and thus no "interception" occurred under the ECPA. *Daccarett*, 6 F.3d at 54; *Organizacion JD*, 18 F.3d at 94; *Consolidated Cases*, Pet. App. B at 3-6.

Furthermore, before the Banks received the EFT communications, the United States District Court for the Eastern District of New York had on or about July 18, 1990 issued a Supplemental Warrant for Arrest of Articles *In Rem*, based upon a Third Amended Complaint in *All Funds*, commanding the Banks to attach "all funds transferred to, through and by" the Banks to Colombian banks for the ultimate benefit of certain named beneficiaries and "all related entities and individuals."[2]

The Banks, which were required to comply with lawful court orders, had no information with which to determine whether any particular EFT beneficiary was a "related" entity. In order to identify the "related" entities, the United States Attorney instructed the Banks to provide information concerning each EFT directed to accounts maintained with the Banks by the Colombian banks. The United States Attorney identified which beneficiaries were related entities and ordered the Banks to attach specific EFT proceeds. The Banks, in a good faith effort to comply with the Warrants for Arrest, followed the Government's orders.

Over the course of the next several weeks, from July 18, 1990 through August 3, 1990, the United States Attorney's Office for the Eastern District of New York supplemented these instructions and orders with the Fourth, Fifth, Sixth and Seventh Amended Complaints together with accompanying Supplemental Warrants for Arrest *In Rem*. All of the Petitioners ultimately were specifically identified as entities whose funds were to be attached.

On or about July 25, 1990, the Banks were served with a "Summons To Snow Cause Why Intangible Property Should Not Be Paid Into Court." This Show Cause Order covered

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[2] On May 13, 1991, Magistrate Judge A. Simon Chrein found that the Government had shown in *All Funds* probable cause "to believe that the defendant funds constitute the proceeds of narcotics trafficking and/or money laundering" under 21 U.S.C. § 881(i) and 18 U.S.C. § 981(g). *Daccarett*, 6 F.3d at 45.

both the funds described in the Warrants for Arrest, and "any and all funds subject to the instant action which are hereinafter deposited, transferred, identified, located, frozen or otherwise discovered or acquired. . . ." The Banks, in compliance with the order, segregated the EFT proceeds and paid them into Court.

The uncontroverted evidence thus establishes that, in sequestering the EFT's and ultimately paying the proceeds into Court, and in providing information concerning the EFT's to the Government, the Banks were doing nothing more than complying with the legal obligations imposed upon them by the express terms of the Warrants for Arrest, DEA subpoenas and Court Orders, as well as by the instructions of the United States pursuant to its authority under the Federal forfeiture laws.

SUMMARY OF THE ARGUMENT

The Second Circuit has three times correctly held that no "interception" occurred here; accordingly, the Banks cannot be liable under the ECPA. The Banks, as the intended recipients of EFT communications, properly received such communications in the ordinary course of their business, and hence did not "intercept" them.

Furthermore, as the Second Circuit has twice correctly held, the Banks' reliance upon court warrants, court orders, DEA subpoenas and the authority of the United States under the Federal forfeiture laws affords the Banks a complete defense.

In any event, even if the Second Circuit's decision here were somehow arguably incorrect, Petitioners still have provided no "special and important" reasons for granting the extraordinary writ of certiorari.

For all of these reasons, the petition does not raise any issues meriting review by the Court.

REASONS FOR DENYING THE WRIT

Rule 10.1 of this Court's Rules provides that a petition will be granted "only when there are special and important reasons therefor." As shown below, there are no such reasons here.

I

THE BANKS CANNOT BE LIABLE UNDER THE ECPA, SINCE THE SECOND CIRCUIT COURT OF APPEALS HAS THREE TIMES CORRECTLY HELD THAT NO "INTERCEPTION" OCCURRED HERE

Petitioners contend that the Banks are liable for violations of § 2511(1)(a) and (c) of the ECPA. Petitioners' Br. at 24. These subsections prohibit, respectively, the intentional "intercept[ion]" of a wire, oral or electronic communication and the intentional disclosure of the contents of any such communication where the person disclosing knows or has reason to know that the information was obtained through the "interception" of the communication.[3] Section 2510(4) of the ECPA defines "intercept" as "the aural or other acquisition of the contents of any wire, electronic, or oral communication

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[3] Section 2511 states in relevant part:

> (1) Except as otherwise specifically provided in this chapter any person who—(a) intentionally *intercepts*, endeavors to *intercept*, or procures any other person to *intercept* or endeavor to *intercept*, any wire, oral, or electronic communication; . . . (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the *interception* of a wire, oral, or electronic communication in violation of this subsection . . . shall be punished as provided in subsection (4) or shall be subject to suit [by the Federal Government] as provided in subsection (5) (emphasis added).

Section 2520 of the ECPA provides a private right of action, subject to all available defenses, to persons whose communications have been intercepted in violation of § 2511.

through the use of any electronic, mechanical, or other *device*" (emphasis added). Accordingly, as a threshold matter, for the Banks conceivably to have violated § 2511(1)(a) and/or (c), they had to have "intercepted" communications through the use of a "device."

However, as the Second Circuit explicitly and unequivocally held—by three entirely separate panels—in the *Daccarett*, *Organizacion JD* and *Consolidated Cases* appeals:

> . . . [T]he seizures did not constitute "interceptions" under the ECPA because no "device" was used, as required under 18 U.S.C. § 2510(4). *See* Daccarett, 6 F.3d at 54. *Because no "interceptions" occurred, plaintiffs have no cause of action under § 2520* (emphasis added).

Organizacion JD, 18 F.3d at 94. *See also Consolidated Cases*, Pet. App. B at 3-6.

A. The Appeal and Petition Are Barred By Principles of Collateral Estoppel

Since the Second Circuit has expressly ruled in *Daccarett* (an appeal and petition for certiorari joined in by the very same Petitioners here) that no "interception" had occurred under the ECPA, and since this Court has declined to grant certiorari in *Daccarett*, thereby letting the Second Circuit's determination stand, this appeal and petition for certiorari are barred by basic principles of collateral estoppel. *See, e.g.*, *Allen v. McCurry*, 449 U.S. 90, 94-95 (1980) (principle of collateral estoppel (or "issue preclusion") bars relitigation of issues that were actually and necessarily decided in prior action where party against whom preclusion is sought had full and fair opportunity to litigate issues in prior action).

B. The Second Circuit Was Correct Each Time In Holding That No "Interception" Occurred Here

Even if there were no preclusive effect arising from *Daccarett*, the record here irrefutably demonstrates that there was no "interception." Indeed, these EFT's could not have been effected unless they were directed to the Banks. The Banks, therefore, as necessary and intended recipients of the EFT's, could not have "intercepted" them; the Banks as addressees simply received the EFT's on equipment designed for that purpose. *See United States v. Andonian*, 735 F. Supp. 1469, 1472 (C.D. Cal. 1990) ("Congress' view of interception can be described as a perpendicular concept, where the interception of a communication crosses its path like the trunk of a 'T' "; thus, the ECPA applies only to "communications which pass from their origin to the intended recipient *and are subject to third-party intervention*" (emphasis added)). As a matter of law and undisputed fact, there was not—and could not have been—any "third-party intervention" by the Banks. Consequently, there could not have been any violation of § 2511(1)(a) or (c) by the Banks.

Petitioners further rely upon § 2511(3)(a) of the ECPA as a purported basis for the Banks' liability. Petitioners' Br. at 18-19, 24-25, 32. This paragraph, however, by its own explicit terms could not and does not apply here. Section 2511(3)(a) provides:

> *Except as provided in paragraph (b) of this subsection*, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (*other than one to such person or entity, or an agent thereof*) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient (emphasis added).

Section 2511(3)(b) goes on to state in relevant part: "A person or entity providing an electronic communication service to the public may divulge the contents of any such communication— . . . (ii) with the lawful consent of the originator *or any addressee or intended recipient of such communication*" (emphasis added). *See also* ECPA § 2702(b)(3) ("[a] person or entity may divulge the contents of a communication . . . with the lawful consent of . . . *an addressee or intended recipient* of such communication" (emphasis added)).

Even assuming that the Banks were "providing an electronic communication service to the public" (which they were not), and that the Banks disclosed the contents of any communications "while in transmission" on an electronic communication service (which they did not), the Banks—as addressees and intended recipients of the communications at issue—were permitted by the express language of §§ 2511(3)(a) and (b) and 2702(b)(3) to disclose the contents of those communications to the United States.[4]

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[4] In typical scattershot and disingenuous fashion, Petitioners also assert in passing that the Banks violated § 2511(2)(a)(i) of the ECPA. Petitioners' Br. at 18-19, 24-25. But once again, the plain language of the statute shows that it has absolutely no application here. This provision states in pertinent part that "a provider of *wire* communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks" (emphasis added). Not only did the Banks *not* use "service observing or random monitoring," they also did *not* provide any "wire" communication service to the public or otherwise. Section 2510(1) of the ECPA defines "wire communication" as an "aural" (*i.e., voice*) transfer made under certain circumstances. The EFT's were "electronic communication[s]" as defined in § 2510(12). *See also Daccarett*, 6 F.3d at 53 (under the ECPA "electronic communications" are different from "oral and wire communications"). Petitioners' incomplete and misleading references to § 2511(2)(a)(i) fail to mention that its prohibition applies only to "wire communication[s]." *See* Petitioners' Br. at 18-19, 24-25.

C. There Is No Conflict Between The Second and Fifth Circuits

Faced with the foregoing, Petitioners contend that the Fifth Circuit Court of Appeals' decision in *Steve Jackson Games, Inc. v. United States Secret Service*, 36 F.3d 457 (5th Cir. 1994), somehow supports their position that the Banks violated the ECPA and creates a conflict between the Fifth and Second Circuits appropriate for resolution by this Court. This assertion can result only from a serious misreading of the *Steve Jackson Games* decision.

The Court in *Steve Jackson Games* addressed the narrow issue of whether the seizure by the Secret Service of a computer containing stored electronic mail sent to, but not retrieved by, the intended recipients constituted an unlawful interception under the ECPA. Neither the intended recipients of the electronic mail nor the owner of the "electronic bulletin board system" on which the mail was stored authorized the defendant Secret Service to gain access to the stored information. The Fifth Circuit upheld the District Court's determination that the Secret Service did not intercept the electronic mail because the acquisition of the contents of those communications was not contemporaneous with their transmission.

The Fifth Circuit's decision is simply not in conflict with the Second Circuit decisions discussed above. In *Daccarett*, 6 F.3d 37, *Organizacion JD*, 18 F.3d 91, and *Consolidated Cases*, Pet. App. B, the Second Circuit held that no interception occurred under the ECPA, and absent an interception, no liability exists for the Banks. As these decisions and the salient facts make clear, the Banks were the intended recipients of the funds transfers, and could not have "intercepted" them. Nothing in the Fifth Circuit decision compels a contrary result. Indeed, in applying a narrow and common sense definition of "interception," the *Steve Jackson Games* decision strongly supports the Banks' position here.

Furthermore, unlike here, the communications at issue in *Steve Jackson Games* were not obtained or disclosed by or with the authority of an intended recipient, a provider of an electronic communication service or a user of such service. In fact, the plaintiffs in *Steve Jackson Games* were the intended recipients themselves who claimed that the communications to them were seized by the defendant Government without their permission. *Steve Jackson Games* recognizes that under 18 U.S.C. § 2701(a) and (c) a "facility through which an electronic communication service is provided" may be accessed with the authority of an "entity providing . . . [an] electronic communications service" or a "user of that service with respect to a communication of or intended for that user." Here, if the Banks were providing such a facility, they had the authority under § 2701(c) to access it, and, if they were not providing such a facility, they are simply not covered by § 2701(a).[5]

D. State Law and Regulation J Are Entirely Irrelevant Here

Petitioners further endeavor to obfuscate the straightforward issues before this Court by discussing at some length various provisions of state law, including Article 4-A of the Uniform Commercial Code, as well as Regulation J of the Federal Reserve System. *See* Petitioners' Br. at 33-38. These provisions of law, however, are entirely irrelevant here. The fact that under state law and Regulation J ultimate beneficiaries of funds transfers may in some circumstances have a right of action has nothing whatsoever to do with the matters at hand. In failing to press any such claims on appeal here,

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[5] Moreover, assuming *arguendo* that the Banks had intercepted the EFT's or that their conduct arguably violated §§ 2701 or 2702, they acted in reliance upon court warrants, court orders, DEA subpoenas and the authority of the United States, and have a complete defense for having done so. *See* Point II *infra*. *Steve Jackson Games* does not address this issue at all inasmuch as the Government was the only defendant.

Petitioners have acknowledged that they have no such claims. Further, inasmuch as the referenced state law and Regulation J causes of action do not require an "interception" and in no way deal with the concept, such law is entirely inapposite to the key question here, *i.e.*, whether there was an "interception" of communications under 18 U.S.C. § 2510, *et seq.*

For the foregoing reasons, the petition should be denied.

II

THE BANKS' RELIANCE UPON COURT WARRANTS, COURT ORDERS, DEA SUBPOENAS AND THE AUTHORITY OF THE UNITED STATES UNDER THE FEDERAL FORFEITURE LAWS AFFORDS THE BANKS A COMPLETE DEFENSE AGAINST PETITIONERS' CLAIMS

Even if the Banks had "intercepted" communications (which as shown above is not the case), their reliance upon court warrants, court orders, DEA subpoenas and the authority of the United States under the Federal forfeiture laws and rules supplemental thereto still affords the Banks a complete defense in this action.

ECPA § 2520(d) provides in relevant part:

> . . . A good faith reliance on—(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization . . . is a complete defense against any civil or criminal action brought under this chapter or any other law.

See also ECPA § 2707(d)(1) (identical language to that of § 2520(d)(1)).[6]

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[6] ECPA § 2511(2)(c) also is pertinent here. This paragraph provides a defense to parties to a communication who are "acting under color of law." As discussed in Point I above, the Banks were parties to the communications at issue and thus may avail themselves of this

A. The Banks' "Good Faith Reliance" Provides Them a Complete Defense

The Second Circuit's prior decisions in *Organizacion JD* and *Consolidated Cases* establish beyond peradventure that §§ 2520(d) and 2707(d) afford the Banks a complete defense. In *Organizacion JD*, the Court held:

> . . . We agree with the District Court that the defendant banks cannot be held civilly liable under § 2707(a) for a violation of § 2701 because their good faith reliance on a court warrant or order is a complete defense under § 2707(d)(1). See Manufacturas Int'l, Ltda v. Manufacturers Hanover Trust Co., 792 F. Supp. at 192-93.

18 F.3d at 94. *See also Consolidated Cases*, Pet. App. B at 7 ("Good faith reliance on a court warrant or order is a complete defense under the statute. *See* 18 U.S.C. § 2707(d)(1). . . . The record supports [the District Court's] finding of good faith. . . . ").[7] Accordingly, under fundamental principles of statutory interpretation, fairness and common sense, *Organizacion JD* and *Consolidated Cases* require denial of this petition.

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defense as well. *See also United States v. Barone*, 913 F.2d 46, 48-49 (2d Cir. 1990) (no violation where party to communication is cooperating with Government); *United States v. Rich*, 518 F.2d 980, 985 (8th Cir. 1975), *cert. denied*, 427 U.S. 907 (1976) (no violation where party recorded conversation at direction of Government). *Cf. Young v. United States Department of Justice*, 882 F.2d 633, 640 (2d Cir. 1989), *cert. denied*, 493 U.S. 1072 (1990) (bank's compliance with judicially-authorized subpoena immunizes it from liability to depositor for any required disclosures).

[7] Although *Organizacion JD* involved BNY and Banco Atlantico, and not MHT, its holding clearly applies to MHT as well. Indeed, that holding explicitly relies upon and refers to the District Court's determination in this action that all three banks were provided a complete defense by §§ 2520(d)(1) and 2707(d)(1). In any event, since all three banks are parties herein, the *Consolidated Cases* holding of the Second Circuit obviously applies to each bank.

There is no question that the Second Circuit in *Organizacion JD* and *Consolidated Cases* reached the only proper result. Each of the Banks indisputably acted in good faith reliance on the Warrants for Arrest, the July 25, 1990 Court Order, the DEA subpoenas and the Attorney General's express statutory authority to seize property under 21 U.S.C. § 881(b).

B. It Is Irrelevant Whether The United States Complied With The ECPA

Faced with the Second Circuit's previous dispositive and correct rulings in *Organizacion JD* and *Consolidated Cases* that the Banks are protected by §§ 2520(d) and 2707(d), Petitioners resort to claiming that the Banks are liable because the United States supposedly did not comply with various provisions of the ECPA. *See* Petitioners' Br. at 23-30.[8] Petitioners, however, willfully and fundamentally misread §§ 2520(d) and 2707(d).

Sections 2520(d) and 2707(d) do *not* provide that banks and other institutions may rely only upon a warrant or order that has been issued pursuant to ECPA §§ 2516(3), 2518(7) or 2703(a) or the Federal Rules of Criminal Procedure. (Nor does the ECPA provide that financial institutions are vicariously liable for the conduct of the Government.) If Congress had intended to place limitations upon the types of warrants, orders, *etc.* that banks could rely on, it would have done so. But as the Second Circuit explicitly recognized in *Organizacion JD*, a complete defense is provided under §§ 2520(d) and 2707(d) for good faith reliance upon, without limitation, "a court warrant or order, . . . a legislative authorization, or a statutory authorization. . . ."

Indeed, while affirming the District Court's dismissal of the claims against the Banks based upon their "good faith reliance" defense, *Organizacion JD* at the same time remanded the claims against the United States by the JD

[8] These provisions are §§ 2516(3), 2518(7) and 2703(a).

claimants (who unlike Petitioners herein had prevailed at the *All Funds* trial) for a determination by the District Court as to whether the United States had complied with ECPA § 2703. *See* 18 F.3d at 94-95. Thus, Petitioners are incorrect in contending that the Second Circuit did not consider in *Organizacion JD* whether the Government had complied with the ECPA. *See* Petitioners' Br. at 23-26. The Court explicitly did address this issue, and held that whether or not the Government had so complied, the record in that case showed that the Banks had an absolute defense under §§ 2520(d) and 2707(d).

Moreover, when faced with the same argument by Petitioners, the Second Circuit in *Consolidated Cases* again explicitly held that the record fully established the Banks' good faith reliance defense. This affirmance of the District Court's factual determination is especially inappropriate for review by this Court.[9]

Any result other than that reached by the Second Circuit would place an impossible burden upon financial institutions by requiring them at their peril to independently determine—

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[9] Petitioners assert that the action must be remanded to permit discovery as to whether the Banks relied in good faith upon court orders issued pursuant to ECPA §§ 2516(3), 2518(7) and 2703(a). Petitioners' Br. at 27-31. As discussed above, however, the Banks' §§ 2520(d) and 2707(d) defense requires dismissal of Petitioners' claims without regard to whether the United States complied with §§ 2516(3), 2518(7) and 2703(a). Thus, the matters upon which Petitioners now maintain they need discovery are totally irrelevant to their purported claims against the Banks. In any case, under Fed. R. Civ. P. 56(f), the opponent of a summary judgment motion who claims to be unable to submit evidence in opposition because further discovery is needed must file an affidavit in the District Court explaining: (1) what facts are sought in discovery and how they are proposed to be obtained; (2) how those facts are reasonably expected to create a genuine issue of material fact; (3) what efforts the affiant has made to obtain those facts; and (4) why those efforts were unsuccessful. *Burlington Coat Factory Warehouse Corp. v. Esprit De Corp.*, 769 F.2d 919, 926 (2d Cir. 1985). Petitioners submitted no such affidavit below. Accordingly, for this additional reason they cannot now be heard to assert that they need discovery.

before following warrants, orders, subpoenas and the like—that the party procuring the warrant or order (or in the case of the government the party giving the instructions) has complied with each and every legal obligation imposed on that party. This, of course, would fatally undermine the effectiveness and enforceability of instruments such as warrants, orders and subpoenas (particularly in exigent circumstances such as were present here), eviscerate the forfeiture laws and render salutary statutes such as §§ 2520(d) and 2707(d) entirely meaningless. It also would put banks in the untenable position of choosing between "Scylla and Charybdis," *i.e.*, of either risking liability for following warrants, orders, subpoenas, *etc.* that might at some future time be determined to have been faulty in some respect or risking liability for not immediately following court and other directives that in fact turn out to have been proper in every single respect. Requiring banks to make this sort of choice is not fair, is not good policy and is clearly not the law in any jurisdiction.

It is, in fact, a matter of well-settled law that financial institutions are permitted—indeed are required—to comply with facially appropriate legal directives given to them. *See, e.g., United States v. First National City Bank*, 396 F.2d 897, 898-99 (2nd Cir. 1968); *United States v. Bremicker*, 365 F. Supp. 701, 702-03 (D. Minn. 1973); *United States v. Jones*, 351 F. Supp. 132, 134 (M.D. Ala. 1972).

This encourages speedy compliance with warrants, orders, subpoenas and the like, while leaving fully available to any allegedly aggrieved person the right to seek relief against the Government in a forfeiture or other proceeding. Such a sensible balancing of competing interests is precisely what the ECPA and the forfeiture laws contemplate in the circumstances here.

As the District Court here recognized:

> [Banks] do not have all the relevant information and cannot make an independent determination of merit.
>
> Moreover, wire transfers occur at such speed . . . that the banks could not, even if they wished, take the time to evaluate orders before deciding whether to comply. Courts recognize that, at least vis-a vis government action, the nature of the property to be seized may justify swift action. . . .
>
> . . . [E]lectronic funds transfers occur almost instantaneously. The Government must be permitted to act swiftly. There is no time or warrant for any independent evaluation by the banks that would interfere with execution of national forfeiture policy. The claimants can and should look for protection in proceedings involving the Government. . . .

792 F. Supp. at 196. In this circumstance, "[t]he banks were acting as agents of the court and should be protected." *Id. See also K/S Norman Agathe v. Sea Trade & Construction, Ltd.*, 767 F. Supp. 60, 62-63 (S.D.N.Y. 1991) (bank acted as agent of court in executing writ of attachment and thus was entitled to court's protection). Consequently, the Banks' §§ 2520(d) and 2707(d) defense must prevail here, without regard to whether the United States itself complied with all legal requirements respecting Petitioners herein.

C. *Daccarett* Bars Any Claim By Petitioners That The United States Acted Wrongfully With Respect to Petitioners

In any case, even if Petitioners' claims against the Banks could be based upon the allegation that the United States acted wrongfully with regard to Petitioners (and clearly they cannot), such claims would be barred by the Second Circuit's decision in *Daccarett*—which explicitly holds that the Government *did* act properly concerning Petitioners and further that Petitioners had no ECPA claim against the Government.

In *Daccarett*, the Court: (a) upheld a jury verdict in *All Funds* requiring Petitioners herein, among other claimants, to forfeit to the United States the amounts of EFT's at issue; (b) affirmed the District Court's dismissal before trial of the ECPA counterclaims of Petitioners and other claimants against the United States; and (c) affirmed the District Court's denial of the motion by Petitioners and other claimants for judgment notwithstanding the verdict. *See* 6 F.3d at 43-59. In so doing, the Court made a number of dispositive holdings that compel denial of this petition (even assuming that the Banks might be held liable for the Government's purported failures, which as shown above the Banks cannot).

First, in upholding the jury verdict requiring forfeiture, the Second Circuit found, among other things, that:

> —The United States had fully complied with the Fourth Amendment and the rules governing the manner in which the United States may seize property under the forfeiture laws.[10]
>
> —The DEA subpoenas (upon which the Banks relied) had been properly issued.
>
> —The United States had probable cause for instituting a forfeiture proceeding.
>
> —The appellants and certain other claimants had failed at the two-month jury trial to establish by a preponderance of the evidence that they were "innocent owners" or

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[10] Significantly, under 21 U.S.C. 881(b), the Government may seize property by following the procedure set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims or merely by having probable cause to believe the property is subject to forfeiture. *See Daccarett*, 6 F.3d at 46. The Government does *not* have to obtain a seizure warrant pursuant to Fed. R. Crim. P. 41(c), and thus is not required to obtain a probable cause finding by a judicial officer before it may seize property. *See Daccarett*, 6 F.3d at 46.

> that the EFT's in question were not traceable to drug transactions.[11]

6 F.3d at 46-57.

Furthermore, in affirming the District Court's dismissal of the ECPA counterclaims by a number of claimants (including Petitioners) against the Government, the Court in *Daccarett* held that no ECPA violation could have occurred, since no "device" was used. 6 F.3d at 54. *See* Point I above.

It would be anomalous—to say the least—for this Court now to contemplate that the *Banks* might be liable to Petitioners for the *Government's* alleged failure to comply with the ECPA, even though the Second Circuit in *Daccarett* explicitly ruled that the Government had acted entirely properly with respect to Petitioners and further that the Government itself could not be liable to Petitioners under the ECPA, and even though this Court declined to grant certiorari in *Daccarett*. It would also be highly anomalous for this Court to create a possibility of the Banks being liable to *these* Petitioners, who lost at trial in *All Funds*, when the Court has, by refusing to grant certiorari in *Organizacion JD*, let stand the dismissal of the ECPA claims against the Banks by the successful claimants in *All Funds*.

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[11] In this regard, the Court in *Daccarett* pointedly quoted from the District Court's decision that " 'the evidence of drug tainting was overwhelming'," and that the claimants, including Petitioners, had presented " 'implausible stories' " and " 'inconsistent positions.' " *Daccarett*, 6 F.3d at 57 (quoting *All Funds*, 801 F. Supp. at 992). And in affirming the District Court's denial of the J.N.O.V. motion, the Court in *Daccarett* further referred to the "overwhelming evidence linking the Atlantico Claimants [which included Petitioners] to drug trafficking and money laundering." 6 F.3d at 59.

III

EVEN IF THE SECOND CIRCUIT'S DECISION HERE WERE SOMEHOW INCORRECT, PETITIONERS STILL HAVE PROVIDED NO "SPECIAL AND IMPORTANT" REASONS FOR GRANTING THE WRIT

As shown above, the Second Circuit's decision here is correct and the petition should therefore be denied. But even if the decision were somehow arguably incorrect, Petitioners still have not offered any "special and important" reasons for granting the extraordinary writ of certiorari. This Court does not serve merely to correct alleged mistakes made by circuit courts. Because there is in no event any compelling basis for granting the writ, it should be denied for this reason as well.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
May 24, 1995

Respectfully submitted,

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ADDENDUM

ADDENDUM

STATUTES INVOLVED

18 U.S.C. § 2510: Definitions

(4) "intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device

18 U.S.C. § 2511: Interception and disclosure of wire, oral, or electronic communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication . . . [or]

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection . . .

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

(2)(a)(i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal

course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service, except that a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(3)(a) Except as provided in paragraph (b) of this subsection, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or an agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

(3)(b) A person or entity providing electronic communication service to the public may divulge the contents of any such communication—

. . .

(ii) with the lawful consent of the originator or any addressee or intended recipient of such communication

18 U.S.C. § 2520: Recovery of civil damages authorized

(d) **Defense.**—A good faith reliance on—

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization . . .

is a complete defense against any civil or criminal action brought under this chapter or any other law.

18 U.S.C. § 2701: Unlawful access to store communications

(a) **Offense.** —Except as provided in subsection (c) of this section whoever—

(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or

(2) intentionally exceeds an authorization to access that facility;

and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished as provided in subsection (b) of this section.

(c) **Exceptions.** —Subsection (a) of this section does not apply with respect to conduct authorized—

(1) by the person or entity providing a wire or electronic communications service; [or]

(2) by a user of that service with respect to a communication of or intended for that user

18 U.S.C. § 2702: Disclosure of contents

(b) **Exceptions.** —A person or entity may divulge the contents of a communication— . . .

(3) with the lawful consent of the originator or an addressee or intended recipient of such communication

18 U.S.C. § 2707: Civil action

(d) **Defense.** —A good faith reliance on—

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization . . .

is a complete defense to any civil or criminal action brought under this chapter or any other law.

21 U.S.C. § 881: Forfeitures

(b) **Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims; issuance of warrant authorizing seizure**

Any property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims. . . , except that seizure without such process may be made when— . . .

(4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture . . .